In the Supreme Court of the United States

OCTOBER TERM 1978

No. 78-1379

TAHOE NUGGET, INC. d/b/a
JIM KELLEY'S TAHOE NUGGET,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

NEVADA LODGE,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

MISCELLANEOUS AUTHORITIES

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The Petitioners, TAHOE NUGGET, INC. d/b/a JIM KELLEY'S TAHOE NUGGET and NEVADA LODGE, respectively pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on August 10, 1978.

OPINION BELOW

The opinion of the Court of Appeals is reported at 584 F.2d 293. A copy appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 10, 1978. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on October 20, 1978. A copy of the order denying rehearing appears in the appendix hereto. Mr. Justice Rehnquist on January 9, 1979, granted a timely application for extension of time for filing this petition to and including March 10, 1979. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether there is a conflict between the decision sought here to be reviewed and decisions on the same matter of federal law of other Courts of Appeals.

2. Whether there is a conflict between panels of the Court below on the same matter of federal law.

3. Whether there is a conflict between the decision here rendered by the National Labor Relations Board (the Board) and other decisions on the same issue rendered by the Board.

4. Whether the Court below was in error in holding that the Board may ignore federal law and for policy reasons establish a presumption based upon two other presumptions.

5. Whether the Board may establish a rebuttable presumption to which it gives mere lip service and which in actual practice as applied by it is an absolute and irrebuttable presumption resulting in a denial of due process.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S.C., Constitution, Amendment 5:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising

> in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Code, Title 29:

> § 158(a)(5): It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees . . .
>
> § 160(b): Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . .

STATEMENT OF THE CASE

Prior to September 18, 1974, Petitioners were members of a multi-employer unit known as the Reno Employers Council (the Council). On September 17, 1974 and September 18, 1974, TAHOE NUGGET and NEVADA LODGE, respectively, timely withdrew from the multi-employer unit and the Council. From 1962 to the respective dates of their withdrawals, Petitioners were represented by the Council in collective bargaining and were parties to the Council's

multi-employer collective bargaining agreement with Local 86 of the Hotel-Motel-Restaurant Employees and Bartenders International Union (the Local). Thereafter, the Petitioners' status was that of a single employer unit.

Based upon certain information which came to their respective attention, the managers of each Petitioner had a good faith doubt as to whether the Local continued to represent a majority of their employees. This prompted the withdrawal from the multi-employer unit.

There had never been a representation election, either in the larger unit or the individual units. By letter, on the dates mentioned, each Petitioner informed the Local of its withdrawal from the Council and the multi-employer unit, and that they were terminating the existing collective bargaining agreement effective as of the end of the term thereof. Subsequently, the Local's attorney wrote each Petitioner requesting that individual bargaining take place. Petitioners' attorney responded on behalf of each that they had a genuine doubt that the Local represented an uncoerced majority in an appropriate unit and urged the Local to petition for an election to demonstrate whether in fact they represented a majority. Petitioners, through their attorney, also offered to cooperate to expedite an election. The response of the Local was to file a refusal to bargain charge against each Petitioner.

The Regional Director of the Board dismissed the charges on the ground that objective considerations properly prompted the Petitioners to question in good faith the Local's majority status, and accordingly the presumption of continuing majority had been rebutted. The Local appealed this ruling to the General Counsel of the Board who reversed the Regional Director and ordered that she issue a complaint for a hearing before an Administrative

Law Judge. Thereupon, before the complaint was issued, Petitioners filed petitions for a representation election. The Regional Director refused to process them on the ground that the charges blocked the election. The Local refused to withdraw the charges or to proceed to an election.

The Administrative Law Judge determined that Petitioners had violated the National Labor Relations Act [61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 15, *et seq.*, §§ 158(a)(1) and (5)] by refusing to bargain. The Judge's finding was based upon a presumption that the Local continued to represent a majority of each Petitioners' employees by reason of the multi-employer contract and that by derivation the presumption applied to the new single employer units. He concluded that the burden was upon Petitioners to prove that their refusal to recognize and bargain with the Local was based upon "a reasonably grounded good faith doubt" that the Locals no longer continued to represent a majority of the employees of each Petitioner. He then proceeded to discuss each objective consideration in isolation and concluded that Petitioners had not rebutted the presumption.

The Board, with one member dissenting, affirmed the Administrative Law Judge. The Court below in enforcing the Board's order took the same approach as did the Administrative Law Judge in analyzing the objective considerations.

REASONS FOR GRANTING THE WRIT

The Decision Below Conflicts With the Decisions of Other Courts of Appeals as to the Application of the Presumption of a Union's Continuing Majority Status.

The decision of the Court below is in conflict with the Sixth, Seventh, Eighth and District of Columbia Circuits.

The Court below concedes, as we shall point out, *infra*, that it is in conflict with, at least the Sixth Circuit. The Court, as did the Board, not only departed from and ignored prior precedent as we shall discuss, *infra*, but treated each objective consideration which led Petitioners to raise in good faith their belief that the Local no longer represented a majority of their respective employees, in isolation rather than dealing with their cumulative effect. As pointed out by the dissenting Board member, there was placed in the record before the Board the evidence available to Petitioners supporting their position which gave rise to their doubt as to the Union's majority status. 227 NLRB 359. Such evidence consisted of: (1) that the Local through its trustee publicly stated the Local represented only 20% of the employees in the multi-employer unit, (2) statements by employees that they were dissatisfied with the Local, (3) the Local mounted a desperate membership drive at the time they were demanding continuing recognition, (4) high employee turnover, (5) reports of employees dissatisfaction with the Local, (6) reports of the Local's inactivity, (7) no dues checkoff, (8) low level of membership among Petitioners' employees, (9) there never had been a representation election, (10) the Local had never been certified, (11) admissions by the Local's representative of the Local's lack of support, and (12) the change from a multi-employer unit to a single employer unit.

The Sixth Circuit in *N.L.R.B. v. Richard W. Kaase Company*, 346 F.2d 24 (C.A. 6, 1965) in dealing with the presumption of a union's continuing majority status, held that withdrawal from a multi-employer unit invalidated the presumption. The Court said there could be no presumption of continuance of a union's majority status as to a single employer after a year following certification of the union in a multi-employer election of which the

employer had been a part. The Court held that before the Board could find the employer in violation of the Act by its refusal to bargain, it is essential to find that at the time of the refusal the union in fact enjoyed a majority status. This burden of so proving, said the Court, was upon the General Counsel. It was there stated (at 31):

> . . . the ambiguity inherent in the multi-employer election here relied on vitiates its efficacy to prove a majority as to any single employer. Before the continuance of the fact of majority support can be presumed, the original existence of that fact must be established.

In *Ingress-Plastene, Inc. v. N.L.R.B.*, 430 F.2d 542 (C.A. 7, 1970), denying enforcement, the Seventh Circuit in considering the objective considerations which there led the employer to question the union's continuing majority status, said (at 547):

> Although the Board attacks each of the reasons advanced by the company in support of its good faith doubt of the union's majority status, the company does not rely on any one reason alone, but rather on all as a whole. We think the entire record, including evidence against the Board's position as well as in favor of it . . . supports the company's position.

Similarly, *Star Mfg. Co., Div. of Star Forge, Inc. v. N.L.R.B.*, (C.A. 7, 1976) 536 F.2d 1192, 1196.

In the instant case the Petitioners did not rely on any one reason alone, although they could have under Board precedent as we will show, but rather on all as a whole.

The Eighth Circuit in *National Cash Register Company v. N.L.R.B.*, 494 F.2d 189 (C.A. 8, 1974) reversed a finding of refusal to bargain and denied enforcement, holding the

employer on the collective basis of four factors could raise a question as to the union's majority status.

The District of Columbia Circuit in accord with the Sixth, Seventh and Eighth Circuits, held an employer who relied upon the cumulative effect of multiple objective considerations, properly raised a good faith doubt as to the union's majority status. *Lodges 1746 & 743, Int. Ass'n. of Mach. & Aero. Wkrs. v. N.L.R.B.*, 416 F.2d 809 (C.A.D.C., 1969).[1]

One of the objective considerations which Petitioners considered was the fact that at the time (14 years previously) they joined the multi-employer unit, the Local did not represent a majority of either of their employees. The Board rejected this evidence on the ground that Section 10(b) of the Act [29 U.S.C. § 160(b)] precluded any attack on the original recognition by the employer. Section 10(b) is the so-called six months statute of limitations under the Act. The Court below agreed with the Board. Here again we have a conflict between Circuits as to the application of 10(b) under the circumstances. In *N.L.R.B. v. Dayton Motels, Inc.*, 474 F.2d 328 (C.A. 6, 1973), the Sixth Circuit in considering the same argument advanced by the Board in the same type of case, denied enforcement of the Board's order to bargain, holding (at 333):

> The fact that this evidence [relating to initial recognition] could have been the basis of an unfair labor practice charge in 1967 is coincidental and ought not to render the evidence inadmissible for another purpose.

1. See also, *N.L.R.B. v. Nu-Southern Dyeing & Finishing Inc.*, (C.A. 4, 1971) 444 F.2d 11, in which enforcement of a refusal to bargain order was denied where an employer questioned the union's continuing majority status based on several factors, including an anti-union petition signed by a majority of employees which the Board refused to consider on the ground that the anti-union petition was the result of the employer's 8(a)(1) violations. The Court held that there were factors other than the anti-union petition, which when viewed in their combined effect, established that the company "possessed a good faith doubt of the union's majority status at the time of the refusal to bargain" (at 16).

The Board in reaching its conclusion relied upon this Court's opinion in *Local Lodge No. 1424 v. N.L.R.B.*, 362 U.S. 411, 80 S.Ct. 822 (1960).[2] The Court in *Dayton Motels, supra*, distinguished *Local Lodge No. 1424*, rightfully pointing out that it represented a different factual situation to which this Court addressed itself and that it did not preclude the use of all evidence relating to events which transpired more than six months prior to the filing of an unfair labor practice charge (474 F.2d at 333):

> In our case, however, the Company's defense is not dependent on the time-barred unfair labor practice. The evidence was offered, to be considered along with other evidence, of its good-faith doubt about the majority status of the Union.

With respect to the Board's argument, the Sixth Circuit stated (at 333-334):

> Hence, as the Board would have it, an employer who had to decide, at the expiration of an initial contract, whether to continue recognition of an incumbent Union, would have to approach the problem in the following manner: The employer would first look at the events surrounding the initial recognition of the Union to see if those events could cast doubt on the representative status of the Union. He would then have to decide whether those facts also would have supported an unfair labor practice charge. If they did not reach the level of proscription under the Act, he could take them into account. If they constituted an unfair labor practice, he could not use them in making his decision.

2. Sometimes referred to as the *Bryan* case.

> Such an artificial standard is obviously impractical and one which is well nigh impossible to be complied with. It would substantially impair, if not obliterate, the efficacy of the defense of good-faith doubt. *Bryan* did not involve the exclusion of evidence of good-faith doubt.

As mentioned, the Court below concedes that it is in conflict with the Sixth Circuit. In referring to *N.L.R.B. v. Dayton Motels, supra,* the Ninth Circuit states that the Sixth Circuit "misperceives the essence of the good faith criterion." (Appendix A, p. 8) It also states that its construction of the reasonable doubt defense is more preferable than that of the other Circuits. (Appendix A, p. 10) It comments that "some courts view these [good faith doubt] as complete defenses; other courts say they simply shift the burden to the General Counsel." (Appendix A, pp. 5-6) The Ninth Circuit agrees with neither approach. It states, in taking a different approach from that of the other Circuits, that its "conclusion is buttressed by pragmatic considerations." (Appendix A, p. 12)

In light of the obvious conflict between the Ninth Circuit and the other Circuits mentioned, this Court should resolve the conflict. The issue is a recurring one in the administration of the National Labor Relations Act. There are currently pending before the Ninth Circuit eight cases which involve the same issue and one in the District of Columbia Circuit. The resolution of the issues involved should not have to depend upon the fortuitous circumstance as to which Circuit may be dealing with them.

There Is a Conflict Among Panels of the Court Below on the Issue of Rebutting the Presumption.

In its earlier decision, the Court below held in *Dalewood Rehabilitation Hospital, Inc. v. N.L.R.B.*, (C.A. 9, 1977) 566 F.2d 77 that a combination of factors is adequate to

provide a basis for an employer's good faith doubt as to a union's majority status when each factor considered alone is insufficient. In denying enforcing of a bargaining order by the Board, the panel of the Court stated (at 79-80):

> The Board concluded that each factor considered separately did not give petitioner reasonable grounds to doubt the Union's majority status and that the evidence as a whole was no greater than the sum of its separate parts.
>
> • • •
>
> The Hospital contends that all of the factors the administrative law judge considered, taken together, provided the basis for a reasonable doubt of the Union's majority status.
>
> The courts require an assessment of the cumulative force of the combination of factors. [Citations] Even when each factor considered alone is insufficient for a good faith doubt of majority status, the combination may be adequate. [Citation]
>
> We believe the combination here was adequate. The employee complaints, the turnover, the deauthorization vote and the decline in the number of authorized dues checkoffs all indicate a loss of Union support.
>
> We hold that the Hospital rebutted the presumption of continued majority status. The burden then shifted to the Board to prove that the Union represented a majority on the day the Hospital refused to bargain. [Citation]

Yet, the panel below considered each of the numerous factors in separate isolation, as did the Board, and concluded they were not sufficient for a good faith doubt of the Local's majority status. The factors here were equal to and in excess of those in *Dalewood Rehabilitation Hospital, supra.* This, apart from the fact that the Board laid down the principle in *Celanese Corporation of America,* 95 NLRB 664 (1951) which we shall discuss more fully

infra, that the answer to the question of whether an employer has violated Section 8(a)(5) of the Act, depends not on whether there was sufficient evidence to rebut the presumption of the union's continuing majority status, but upon whether the employer in good faith believed that the union no longer represented the majority of the employees. It is also significant that the Regional Director of the Board based upon the Board's prior decisions and upon the factors which motivated the Petitioners, concluded there was no violation of the Act by Petitioners and dismissed the unfair labor practice charges.

In view of the evident conflict between panels of the Court below, this matter should at least be remanded so the Court of Appeals can reconcile its internal difficulties. *Wisniewski v. United States*, 353 U.S. 901, 902, 77 S.Ct. 633, 634 (1957); *Western Pac. R. Corp. v. Western Pac. R. Co.*, 345 U.S. 247, 260, 73 S.Ct. 656, 663 (1953).

The Board's Decision Is in Direct Conflict with Its Prior Holdings on the Same Issue.

In its seminal decision adopting its presumption relating to a union's continuing majority status, the Board in *Celanese Corporation of America*, 95 NLRB 664 (1951), stated:

> We believe that the answer to the question whether the Respondent violated Section 8(a)(5) of the Act on October 8 depends, *not on whether there was sufficient evidence to rebut the presumption of the Union's continuing majority status or to demonstrate that the Union in fact did not represent the majority of the employees, but upon whether the Employer in good faith believed that the Union no longer represented the majority of the employees.* The latter point was not considered by the Trial Examiner. [Part of emphasis added] 95 NLRB at 665, 28 LRRM at 1365.

In the instant case the Board departed from its holding in *Celanese* by determining whether there was sufficient evidence to rebut the presumption. It analyzed in isolation each objective consideration which Petitioners had considered in reaching their good faith doubt. The Court below did likewise. It is to be noted the Board held in *Celanese* that the answer lies in whether "the *employer in good faith* believed that the Union no longer represented the majority of the employees." There was no finding, and there could be none, that Petitioners did not in good faith believe the Local no longer represented a majority of their respective employees. It is clear that what the Board said in *Celanese* was that the presumption is overcome if the employer in good faith believes there is doubt as to the union's majority status. Yet, the Board and the Court below substituted their judgment as to good faith belief. The criteria is not what the Board or the Court below, if they had to determine whether there was doubt, would conclude.

Neither the Board nor the Court rationalized their departure from *Celanese* which has not been overruled nor modified. In fact, the Court below did not ever consider *Celanese*. As stated in *International Union (UAW) v. N.L.R.B.*, 459 F.2d 1329, 1341 (C.A.D.C., 1972) in which the Board was reversed:

> It is an elementary tenet of administrative law that an agency must either conform to its own precedents or explain its departure from them. *See, e.g.*, Secretary of Agriculture v. United States, 347 U.S. 645, 653, 74 S.Ct. 826, 98 L.Ed. 1015 (1954).

Similarly, the Court in *Teamsters Local 769 v. N.L.R.B.*, 532 F.2d 1385 (C.A.D.C., 1976) again reversing the Board, held (at 1392):

> But the Rule of Law requires that agencies apply the same basic standard of conduct to all parties appearing before them. Thus, "if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute."[3]

Moreover, in dealing with objective considerations, the Board in *Celanese, supra,* said that whether an employer has questioned a union's majority in good faith "can only be answered in the light of the totality of all the circumstances involved." Yet, the Board and the Court below failed to follow this principle and viewed in isolation each of the numerous factors which impelled the Petitioners to question in good faith whether the union continued to represent a majority.

Assuming, *arguendo,* that the Court below and the Board could, as they did, examine each objective consideration, in so doing they ignored prior Board precedent. Under its precedents in effect at the time Petitioners questioned the Union's majority status, each of the objective considerations which came to their attention were equal to or exceeded what the Board regarded as valid objective considerations at the time. In effect, the Board, without any rationalization, did a full switch in its position. The Court below did not deal with this fact, although brought to its attention.

As to the individual factors which constituted the objective considerations, Petitioners proved: (1) that no election was ever held among the employees to determine whether they wanted to be represented by the Local; *Taft Broadcasting,* 201 NLRB 801 (1973); *Nu-Southern Dyeing & Finishing, Inc.,* 179 NLRB 573 (1969); (2) that a substan-

3. Citing *Greater Boston TV Corp. v. FCC,* (C.A.D.C. 1970) 444 F.2d 841, 852, cert. denied, 403 U.S. 923, 91 S.Ct. 2299, 2233.

tial number of employees complained to management that they were dissatisfied with the Local and did not want the Local to represent them; *Peoples Gas System, Inc.,* 214 NLRB 944 (1974); *Southern Wipers, Inc.,* 192 NLRB 816 (1971); (3) that during the period of the latest collective bargaining agreement there was a turnover of 80 to 100 percent among the employees; *Peoples Gas System, supra, Southern Wipers, Inc., supra*; (4) that during the period the collective bargaining agreement had been in effect, the Local never attempted to enforce its provisions by either inspecting the premises or soliciting grievances from employees and never filed a single grievance; *Lloyd McKee Motors, Inc.,* 170 NLRB 1278 (1968); *Peoples Gas System, Taft Broadcasting* and *Southern Wipers, Inc.,* each *supra;* (5) that the Local had experienced serious financial difficulties occasioned by a substantial loss of members; *Peoples Gas System, Taft Broadcasting,* both *supra, Viking Lithographers,* 184 NLRB 139 (1970); (6) that the Local was placed in trusteeship because of the inability of its officers and business representatives to secure support from the employees employed in Northern Nevada, *Peoples Gas System, Taft Broadcasting, Viking Lithographers,* all *supra;* (7) that the Local conceded that only 20% of the employees involved were unionized and the Local was mounting a desperate organizing campaign, *Peoples Gas System, supra;* (8) that at the time Petitioners voluntarily recognized the Local by joining the multi-employer unit, the Local did not represent a majority of either Petitioners' employees; and (9) the substantial and material change from being a part of a multi-employer unit to a single unit employer, *Peoples Gas System, supra.*[4]

4. In the spring of 1974, the same year in which Petitioners questioned the Local's majority status, the Local called a meeting and none of Petitioners' employees attended [Appendix A, p. 25].

As pointed out in *Zim's Foodliner, Inc. v. N.L.R.B.* (C.A. 7, 1974) 495 F.2d 1131, 1140:

> The Board has held that even informal employee statements to the employer regarding employee sentiment may provide a basis for good faith doubt. *Wallace Co.*, 174 NLRB 416 (1969).

In December 1974, when Petitioners challenged the Local's majority status, it relied on factors which were then Board law and which factors were individually and, at least, collectively sufficient to support their good faith doubt of the Local's continuing majority. As was so aptly put by the Court in the very recent decision of *Marshall v. Baltimore & Ohio Railroad Co.* (D.C. Md. #N-74-637, Dec. 5, 1978), "individuals and businesses are entitled to rely on interpretations of existing law in arranging their activities."

The Board's Derivative Presumption Is Contrary to Federal Law and Is Impermissible.

The Board in the instant cases in fashioning a so-called derivative presumption, adopted the erroneous rationale of the Administrative Law Judge whose brainchild it was:

> However, I believe that the presumption of continued majority flowing from the multi-employer contracts requires a *derivative presumption* of the Union's majority status which is applicable to each of the employer-members of the multiemployer bargaining unit separately. *Jim Kelley's Tahoe Nugget*, 227 NLRB 357, 363 (1976); *Nevada Lodge*, 227 NLRB 368, 374 (1976). [Emphasis supplied]

Board member Walther in attacking this novel and legally contrary approach, noting that in all of the 14 years of the multi-employer relationship there never was any

attempt to ascertain the majority sentiments of the employees, states:

> I take issue with my colleagues' conclusion that the presumption of majority status flowing from the contract in the multi-employer unit survives Respondent's timely withdrawal from that unit. By a process resembling alchemy, my colleagues have concocted the existence of majority status with only the thinnest support in legal reason and have, in complementary fashion, ignored valid distinctions between the presumptions applicable to single-employer and multiemployer units.
>
> • • •
>
> My colleagues argue that unless a majority of Respondent's employees in 1962 desired representation by Local 86 Respondent could not lawfully have forced representation on them by joining the multiemployer unit. They further note that Respondent cannot now attack Local 86's majority status among its own employees at the time of original recognition because of Section 10(b). From this my colleagues, citing cases which deal with the presumption of majority status in single-employer units, construct two entirely distinct and severable presumptions which in turn give birth to yet a third presumption. Starting with (1) a valid presumption of majority status in the multiemployer relationship, they turn back, and (2) interweave a second presumption of former majority status in the single-employer unit based upon the 10(b) prohibition against finding conduct which occurred years ago to be unlawful. From the interweaving of these two presumptions the majority manages to conceieve yet a third presumption of current majority status in the single-employer unit which otherwise has no basis in fact or in logic. While I do believe that the Board can and should base violations of Section 8(a)(5) upon legitimate legal presumptions, a violation predicated upon a presumption arising not out of fact but out of the intermarriage of two other presumptions is, in my

> view, not a proper basis upon which to establish a violation. It must never be forgotten that an 8(a)(5) finding effectively prevents employees from exercising their right to a free choice in the selection of a collective-bargaining representative—a right these employees have never had an opportunity to exercise. *Jim Kelley's Tahoe Nugget*, 227 NLRB at 358; *Nevada Lodge*, 227 NLRB at 368.

Early on this Court held that a presumption cannot be built upon another presumption. *U.S. v. Ross*, 92 U.S. 281, 23 L.Ed. 707 (1876); *Manning v. Insurance Co.*, 100 U.S. 693, 698 (1880); *Looney v. Metropolitan R. Co.*, 200 U.S. 480, 26 S.Ct. 303, 306 (1906). Since then many Courts of Appeals have so similarly held. *Otis Elevator Company v. Yager*, 268 F.2d 137, 144 (C.A. 8, 1959); *Smith v. Fidelity Casualty Company of New York*, 261 F.2d 460, 462 (C.A. 5, 1958); *J. W. Ringrose v. W & J Sloane*, 266 F.2d 402, 404 (E.D. Pa., 1920), affd. 272 F. 445 (C.A. 3, 1921); *Smith v. Pennsylvania R. Co.*, 239 F. 103, 104 (C.A. 2, 1917); and *Hall v. Atchison, Topeka & Santa Fe Railway Company*, 349 F.Supp. 326, 330 (D. Kansas, 1972).

The Board here has gone even beyond basing a presumption upon a presumption. As Board member Walther points out, the Board has given "birth to yet a third presumption." 227 NLRB at 358 and 368. The Board's entire case and its conclusion, which the Court below followed, rest upon a presumption upon a presumption upon a presumption. The Board and the Court below treated its triple headed presumption as evidence. Without it, the Board had no basis for its conclusion.

In adopting the Board's derivative presumption approach, the Court below also ignored its own precedent. *Ariasi v. Orient Ins. Co.*, 50 F.2d 548, 552-554 (C.A. 9, 1931)

in which the Court below cited and quoted copiously from authority that a presumption is not evidence and has no probative force. The Court below based its approval of the Board's hydra-headed presumption on policy considerations. 584 F.2d at 303-304. Policy considerations cannot override the law. The principal reason courts recognize a presumption is probability. *Ref-Chem Company v. N.L.R.B.*, 418 F.2d 127, 130-131 (C.A. 5, 1969); McCormick, Evidence, § 309, p. 641.

The Board's Presumption Is One of Irrebuttable Force and Constitutes a Denial of Due Process.

Petitioners, at the Board hearing, sought to introduce evidence which would demonstrate that the Local did not in fact represent a majority of their respective employees. The Board rejected this evidence and the Court below did not deal with the issue.

In defining administrative due process, this Court said in *Hormel v. Helvering*, 312 U.S. 552, 560, 61 S.Ct. 719, 723 (1941):

> Congress has entrusted the Board with exclusive authority to determine disputed facts. Under these circumstances we do not feel that petitioner should be foreclosed from all opportunity to offer evidence before the Board on this issue . . .

Despite this Court's mandate, Petitioners here were foreclosed by the Board's rejection of their proffered evidence and by the Board's application of its presumption, which made the presumption one of "irrebuttable force." This brings into play the issue of due process. The Court below, in an earlier decision, citing with approval this Court's opinion in *Hormel v. Helvering, supra*, stated in *N.L.R.B. v. Heyman*, 541 F.2d 796 (C.A. 9, 1976) at 801:[5]

5. The Board's order was denied enforcement in that case.

> As a statute creating a presumption which operates to deny a fair opportunity to rebut would not afford due process . . . a Labor Board presumption to the same effect would also suffer shortcomings.

Also in *Heyman, supra*, the Court below held (at 801):

> . . . by coupling § 10(b) with the presumption the Labor Board would create an irrebuttable presumption having the substantive law effect that was rejected in *Local Lodge*.[6]

Here again, we have a conflict between panels of the Court below.

Moreover, the summary rejection of the proffered evidence by the Board and its application of its presumption here has the practical and actual effect of permitting the Board and the Local to stonewall any access to evidence relating to actual majority status. Thus, the Board has created an irrebuttable presumption.

This Court examined the matter of an irrebuttable presumption, hence one of substantive law, in *Manhattan General E. Co. v. Commissioner of Int. Rev.*, 297 U.S. 129, 56 S.Ct. 397 (1936) and declared (297 U.S. at 134):

> The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law, for no such power can be delegated by Congress . . .

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6. The reference is to *Local Lodge No. 1424 v. N.L.R.B.*, 362 U.S. 411.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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Appendix A

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EMIL E. MELFI, JR.
Clerk, U.S. Court of Appeals

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, *Petitioner,* vs. TAHOE NUGGET, INC., d/b/a JIM KELLEY'S TAHOE NUGGET, *Respondent.* HOTEL, MOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS' UNION, *Intervenor.*	No. 77-2095
NATIONAL LABOR RELATIONS BOARD, *Petitioner,* vs. NEVADA LODGE, *Respondent.* HOTEL, MOTEL, RESTAURANT EMPLOYEES AND BARTENDERS' UNION, LOCAL 86, *Intervenor.*	No. 77-2105

OPINION

On Application for Enforcement of an Order of
the National Labor Relations Board

Before: TRASK and ANDERSON, Circuit Judges, and GRANT,* District Judge

ANDERSON, Circuit Judge:

Pursuant to 29 U.S.C. § 160(e), the National Labor Relations Board has petitioned for enforcement of its Orders against respondents. The Board, affirming the findings made by an Administrative Law Judge in separate hearings,[1] found respondents Tahoe Nugget and Nevada Lodge violated sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act (the Act). We grant enforcement.[2]

In 1959, the Reno Employers Council (the Association), a voluntary combination of restaurant and casino employers, entered into a collective bargaining agreement with Union Local 86 (the Union).[3] Soon after it opened in 1958, Nevada Lodge joined the Association; Tahoe Nugget joined after opening for business in 1962.[4] A series of three-year contracts, the last expiring on November 30, 1974, recognized the Union and set terms and conditions of employment for all Association members. By joining the Association, both respondents recognized the Unions as bargaining representative for its employees; an election has never been held in either single employer unit or in the multi-employer unit.

*The Honorable Robert A. Grant, Senior United States District Judge for the Northern District of Indiana, sitting by designation.

1. In *Tahoe Nugget*, the first of the two cases to reach the the Board, the Administrative Law Judge's decision was affirmed "for the reasons set forth. . . [in the Board's Decision and Order] rather than for the reasons set forth in his Decision." We find the Board's opinion only clarifies and narrows the rationale relied on by the Administrative Law Judge. The Board's decision and order in No. 77-2095 is reported at 227 NLRB No. 72 and in No. 77-2105 at 227 NLRB No. 73.

2. At oral argument, respondents conceded the Board had jurisdiction. Our jurisdiction is clear. See 29 U.S.C. § 160(e), (f).

3. Hotel-Motel Restaurant Employees & Bartenders Union, Local 86, Hotel Restaurant Employees & Bartenders International Union, AFL-CIO.

4. The record does not show whether either respondent recognized the Union before joining the Association. Inasmuch as both respondents joined the Association soon after opening for business, it is unlikely either respondent did recognize the Union before then.

On September 17, 1974, Nevada Lodge withdrew from the Association; on October 25, it refused to recognize or bargain with the Union. Tahoe Nugget took the same action on September 18 and October 23, respectively. The withdrawals were timely.[5] In November, the Union filed unfair labor practice charges against respondents. Subsequently, each employer filed an election petition, but under established Board practice, the elections were stayed pending the outcome of the unfair labor practice charges.

The Union alleged that respondents' refusal to bargain violated section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5), and that respondents subsequently interfered with the free exercise of employee rights in violation of section 8(a)(1), 29 U.S.C.§ 158(a)(1). The refusal to bargain charge was premised on the Union's presumed majority status. Respondents defended by introducing evidence to show their refusal was based on a reasonable doubt of the Union's majority.[6] The Board found respondents' proof unconvincing.

The 8(a)(1) violations charged were of two varieties: dependent and independent. The dependent 8(a)(1) charges flowed from the refusal to bargain: by refusing to bargain with the employees' bargaining representative, the employer interferes with the employees' organizational rights and thereby violates 8(a)(1), if the refusal is not justified.

5. *See generally NLRB v. Sheridan Creations, Inc.*, 357 F.2d 245 (2d Cir. 1966), *cert. denied*, 385 U.S. 1005 (1967).

6. Evidence to show the Union was actually in the minority was also offered; but the evidence was clearly insufficient and therefore will not be discussed.

The Board upheld these charges inasmuch as the refusal to bargain had been adjudged unlawful.[7] The independent 8(a)(1) charges stemmed from unilateral wage and benefit increases instituted after the collective bargaining agreement expired. These charges were also sustained by the Board.

Respondents' primary contentions on appeal are:

1. The presumption of majority status is inapplicable; and
2. A reasonable doubt has been proved.

The presumption endorsed by the Board must be upheld unless it fails to evenhandedly further the Act's purpose.[8] The Board's factual findings must be sustained if supported by substantial evidence in the record considered as a whole.[9]

THE PRESUMPTION

To sustain an 8(a)(5) charge, the General Counsel must show the union represented a majority of the unit employees when the employer refused to bargain. The Board employs two presumptions obviating an evidentiary showing of majority status. For a reasonable time, usually one year, after certification or voluntary recognition, majority support is irrebuttably presumed absent "unusual circumstances."[10] After one year, the presumption becomes rebuttable. Absent sufficient counter-vailing proof, the presumption establishes, without more, the employer's duty to bargain. *NLRB v. Tesoro Petroleum Corp.*, 431 F.2d 95, 97 (9th Cir. 1970).

Respondents contend a presumption cannot have such efficacy under rule 301, Federal Rules of Evidence.[11] Only a superficial reading of the rule supports this contention. The courts have approved the presumption's use and force in reviewing 8(a)(5) violations, both before and after the adoption of the Federal Rules of Evidence.[12]

The presumption is rebutted if the employer shows, by clear, cogent, and convincing evidence,[13] that the union was in the minority or that the employer had a good faith reasonable doubt of majority support at the time of the refusal.[14] Some courts view these as complete defenses;[15]

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7. In *Nevada Lodge*, an additional 8(a)(5) violation was based on respondent's refusal to bargain about a dental insurance plan. Since granting the dental plan was also found to constitute an independent 8(a)(1) violation, we do not determine whether respondent's defense of contractual waiver should have been upheld by the Board.

8. *See Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 681 n. 1 (1944); *Royal Typewriter Co. v. NLRB*, 533 F.2d 1030 (8th Cir. 1976); *NLRB v. Leatherwood Drilling Co.*, 513 F.2d 270, 272 (5th Cir. 1975), *cert. denied*, 423 U.S. 1016 (1975).

9. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

10. *NLRB v. Lee Office Equipment*, 572 F.2d 704, 706 (9th Cir. 1978). One such "unusual circumstance" is a radical change in the size of the unit. *Brooks v. NLRB*, 348 U.S. 96 (1954).

11. "In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast."
Fed. Rules Evid., Rule 301, 28 U.S.C.

12. *E.g., NLRB v. Vegas Vic, Inc.*, 546 F.2d 828 (9th Cir. 1976), *cert. denied*, 98 S.Ct. 57 (1978); *NLRB v. Traginiew*, 470 F.2d 669 (9th Cir. 1972).

13. *Pioneer Inn Associates v. NLRB*, #77-1825 (9th Cir., July 19, 1978); *Orion Corp. v. NLRB*, 515 F.2d 81, 85 (7th Cir. 1975); *see NLRB v. Traginiew*, 470 F.2d at 674-75. As applied to the reasonable doubt defense, this criterion is primarily directed to the type of evidence relied upon; the standard of proof is unchanged, to wit: whether there is sufficient reliable evidence to cast serious doubt on the union's majority. *See Retired Persons Pharmacy v. NLRB*, 519 F.2d 486, 489-90 (2d Cir. 1975).

14. *NLRB v. Vegas Vic, Inc.*, 546 F.2d at 829.

15. *E.g., NLRB v. Dayton Motels, Inc.*, 474 F.2d 328, 332 (6th Cir. 1973).

other courts say they simply shift the burden to the General Counsel.[16] Since the General Counsel usually relies on the presumption alone, as he did here, the distinction is primarily academic.

Proving minority status is a straightforward factual question. When the employer seeks to rely on the less exacting standard of reasonable doubt, he must also show the doubt was entertained in good faith. *Orion Corp. v. NLRB*, 515 F.2d 81, 85 (7th Cir. 1975).

Respondents sought to substantiate their factual defense by showing the Union did not enjoy majority support at the time of voluntary recognition. The showing was disallowed as time barred.

In *Bryan Manufacturing*,[17] the Supreme Court held that the six-month statute of limitations for filing unfair labor practice charges contained in § 10(b) of the Act can also act as an evidentiary bar. The issue arose when an employer recognized a minority union and entered into a collective bargaining agreement with it. No unfair labor practice charges were filed for ten months. The Board upheld the charges, reasoning that execution of the agreement was a continuing violation. The Supreme Court reversed, holding that § 10(b) precluded a challenge to the union's majority position.

Two situations were differentiated. The Court said when events within the six months preceding the filing of charges "may constitute, as a substantive matter, unfair labor practices," evidence showing earlier unfair labor practices

16. *E.g., Dalewood Rehabilitation Hospital, Inc. v. NLRB*, 566 F.2d 77, 80 (9th Cir. 1977); *National Cash Register Co. v. NLRB*, 494 F.2d 189, 194 (8th Cir. 1974).

17. *Local Lodge No. 1424 International Association of Machinists, etc. v. NLRB*, 362 U.S. 411 (1960).

is admissible to clarify the more recent events. When, however, the recent events violate the Act only if an earlier unfair practice occurred, the prior events are not merely evidentiary and evidence thereof is inadmissible. The facts in *Bryan Manufacturing* fell into the second category because enforcement of the agreement was illegal only if its execution were an unfair labor practice.

Here we are presented with the other side of the coin. Respondents intended to use the evidence defensively to prove their conduct was lawful. Respondents argue the evidence clarifies their subjective motivation and is therefore admissible to prove their good faith doubt defense.

In *NLRB v. Traginiew, Inc.*, 470 F.2d 669 (9th Cir. 1972), this court held that evidence of an unfair labor practice that occurred beyond the 10(b) period could not be admitted in defense of a refusal to bargain charge. *Accord, Lane-Coos-Curry-Douglas Counties Building and Construction Council, AFL-CIO v. NLRB*, 415 F.2d 656, 659 n. 7 (9th Cir. 1969). Other courts agree that under *Bryan Manufacturing* a defunct unfair practice claim cannot be revived to defend subsequent charges. *E.g., NLRB v. District 30, United Mine Workers of America*, 422 F.2d 115, 122 (6th Cir. 1969), *cert. denied*, 398 U.S. 959 (1970). In *Traginiew*, however, the employer had not attempted to avail himself of the good faith doubt defense, but only tried to prove the union was in the minority. Consequently, the court did not consider the precise question raised by respondents.[18]

18. Compare majority and dissenting opinions in *NLRB v. Dayton Motels, Inc.*, 474 F.2d 328 (6th Cir. 1973) for contrasting views on what *Traginiew* portends here. *See also NLRB v. Denham*, 469 F.2d 239 (9th Cir. 1972), *vacated*, 411 U.S. 945 (1973).

In *Daisy's Originals, Inc. of Miami v. NLRB*, 468 F.2d 493, 501 (5th Cir. 1972), the court did apply the *Bryan Manufacturing* rule

The defense respondents press has two parts:

1. objective facts sufficient to support a reasonable doubt; and
2. the employer's good faith.[19]

NLRB v. Cornell of California, Inc., #76-1545 (9th Cir., June 14, 1978). The Sixth Circuit has held in similar circumstances that evidence otherwise time barred is admissible to substantiate the second part of the defense presented here.

In *NLRB v. Dayton Motels, Inc.*, 474 F.2d 328 (6th Cir. 1973), the employer sought to defend refusal to bargain charges by showing that union authorization cards, obtained more than six months previously, were procured fraudulently. The court held that evidence to support this defense was admissible. The employer does not resurrect a stale claim by showing the original authorization cards were obtained through fraud, the court reasoned, but only proves that the employer acted in good faith.

We think this misperceives the essence of the good faith criterion. The good faith criterion is ordinarily satisfied if, at the time the employer challenges the union majority,

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to disallow an attack on the union's initial majority when the employer had raised the reasonable doubt defense. There, however, the focus was on the effect of certain unfair labor practice, and it is unclear whether the distinction pressed by respondents was raised.

19. These criteria comprise two corollaries:
    1. the perceived decline in union support must not be attributable to employee [sic] misconduct; and
    2. evidence showing the union does enjoy majority support must also be considered.

See Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 687 (1944); ***Frank Bros. Co. v. NLRB***, 321 U.S. 702 (1944); ***NLRB v. Sky Wolf Sales***, 470 F.2d 827, 830 (9th Cir. 1972); ***Fremont Newspapers, Inc. v. NLRB***, 436 F.2d 665, 671 (8th Cir. 1970); ***Terrell Machine Co. v. NLRB***, 427 F.2d 1088, 1090 (4th Cir. 1970), ***cert. denied***, 398 U.S. 929 (1970).

the employer has knowledge of the facts which give a reasonable basis for doubting the union's majority.[20] The good faith criterion is unconcerned with the employer's subjective motivation; its focus is empirical and objective. *See NLRB v. Vegas Vic, Inc.*, 546 F.2d 828 (9th Cir. 1976), *cert. denied*, 98 S.Ct. 57 (1978). What the employer knew is determinative, not why he challenged the union's position. *See Automated Business Systems v. NLRB*, 497 F.2d 262 (6th Cir. 1974); *NLRB v. Gulfmont Hotel Co.*, 362 F.2d 588, 589 (5th Cir. 1966); Seger, *The Majority Status of Incumbent Bargaining Representatives*, 47 Tul. L. Rev. 961, 984 (1973).

In a parallel context, the Supreme Court has deemphasized motivation. In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the court endorsed the Board's disregard of an employer's subjective motivation in election cases:

> "Under the Board's current practice, an employer's good faith doubt is largely irrelevant, and the key to the issuance of a bargaining order is the commission of serious unfair labor practices that interfere with the election processes and tend to preclude the holding of a fair election. Thus, an employer can insist that a union go to an election, regardless of his subjective motivation, so long as he is not guilty of misconduct; he need give no affirmative reasons for rejecting a recognition request, and he can demand an election with a simple 'no comment' to the union. The Board pointed out, however, (1) that an employer could not refuse to bargain if he *knew*, through a personal poll for instance

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20. *See Lodges 1746 & 743, Int'l. Ass'n. of Machinists & Aerospace Workers v. NLRB*, 416 F.2d 809 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1058 (1970) (good faith can be inferred from employer's knowledge of objective grounds). We are not confronted here with a question as to the timeliness of the employer's refusal to recognize. See text at n. 5. Assumably, this is a separate consideration. *But see id.*

that a majority of his employees supported the union, and (2) that an employer could not refuse recognition initially because of questions as to the appropriateness of the unit and then later claim, as an afterthought, that he doubted the union's strength." *Id.* at 594.[21]

See Komatz Construction, Inc. v. NLRB, 458 F.2d 317, 326 (8th Cir. 1972) ("In view of the demise in *Gissel Packing* of the subjective test of an employer's good faith doubt, 395 U.S. at 608, 89 S.Ct. 1918, the proper test for rebuttal of the presumption is whether there is objective evidence sufficient to warrant a good faith doubt of the union's majority. . . .")

In contrast to the situation in *Gissel Packing*, the employer must give "affirmative reasons" for challenging the union's position when asserting the reasonable doubt defense. The added burden is justified here because the Union's majority has already been established once. The Act favors stability in bargaining. Therefore, the employer must affirmatively defend his decision when he disrupts the existing relationship whereas he must only proceed in good faith when refusing to recognize the union initially.[22]

Our construction of the reasonable doubt defense also comports with the Act's emphasis on neutral employer-union conduct to ensure employees unfettered freedom regarding their organizational desires. Congressional policy with respect to unfair practices is directed to con-

21. In *Gissell*, the court also approved the *Cumberland Shoe doctrine*, stating:

"We therefore reject any rule that requires a probe of an employee's subjective motivations as involving an endless and unreliable inquiry."

395 U.S. at 608.

22. The two conditions enumerated in the quote from *Gissel Packing* are functionally equivalent to the good faith facet of the reasonable doubt defense. See n. 19, *supra*, and accompanying text.

trolling misconduct: it does not require the employer to embrace the union movement's precepts. Even when anti-union motivation is a necessary element of the unfair labor practice, conduct is still the key. The subjective inquiry is necessary to determine whether the employer has acted impartially; the presence of anti-union animus is immaterial unless it prompts the misconduct. *See NLRB v. Tayko Industries, Inc.*, 543 F.2d 1120 (9th Cir. 1976); *Conolon Corp. v. NLRB*, 431 F.2d 324 (9th Cir. 1970), *cert. denied*, 401 U.S. 908 (1971).

We hold the employer is free to act on the objective grounds before him, regardless of his underlying motivation. If union support is lacking, the employer's action actually furthers the cause of employee democracy by overcoming the inertia which helps maintain the status quo.[23] Since the employer's action is not in derogation of employee rights, his subjective motivation is important only evidentially.[24] In sum, when challenging the union

23. *See Teamsters Local Union 769 v. NLRB*, 532 F.2d 1385, 1390 (D.C. Cir. 1976).

24. "If the employer's discriminatory conduct is inherently destructive of important employee rights, then no proof of subjective anti-union motivation is necessary to support the charge. However, if the destructive impact on employee organizational rights is comparatively slight, the employer may defend against the charge by introducing evidence showing that the conduct was motivated by business or other legitimate considerations. If the employer can produce such information, the aggrieved party may, in turn, submit evidence showing a substantial anti-union motivation. The showing of a substantial anti-union motivation is sufficient to support the charge, even if some legal motivating factors are present. Thus, substantial evidence from which the Board can infer the motivation of the employer at the time of the discharge may be essential to the defense to or proof of the charge." (footnotes omitted) Note, *The Labor Statute of Limitations: The Bryan Manufacturing Co. Case Revisited*, 55 B.U.L. Rev. 598, 618 (1975).

If, but only if, the employer can show the union's majority is truly in doubt, the situation confronted is at the opposite end of the spectrum from the situation where the employer's conduct is

majority, good faith is demonstrated if the employer is aware of the facts manifesting lack of union support and employer misconduct did not contribute to the loss of support.

Our conclusion is buttressed by pragmatic considerations. Administratively and evidentially, testing objective facts is simpler and more precise than probing an employer's mind.[25] Also, an objective construction of the reasonable doubt defense eliminates uncertainty for the employer and reduces the risk of an erroneous determination if an unfair practice charge is filed. *See Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

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inherently destructive of employee rights. It follows that not only is proof of anti-union motivation then unnecessary, but it is immaterial to the charge. We emphasize, however, that the employer must have ample evidence in support of his doubt before we can condone this assumption of the cause of employee democracy.

25. Christensen and Svanoe, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality*, 77 Yale L.J. 1269 (1968); 55 B.U.L. Rev., *supra* note 24, at 623; Seger, *The Majority Status of Incumbent Bargaining Representatives*, 47 Tul. L. Rev. 961, 981-87 (1973).

Though knowledge does entail ascertaining what is in the employer's mind, the inquiry ceases there. Inferences are unnecessary. If the total of the employer's knowledge and ignorance is sufficient to support a reasonable doubt, the defense is established. On the other hand, when the Act prohibits conduct for an unnlawful purpose, the Board must also infer why the employer acted. Theoretically, the good faith defense could require another strictly subjective finding based on inference, i.e., whether the employer actually believed certain facts which support the asserted reasonable doubt. But the Board has applied an objective test: the doubt is unreasonable if premised on unreliable evidence regardless of the employer's subjective belief. We think the converse is also true. We have found no case holding that an employer could not assert a reasonably based doubt because, though aware of the supporting facts when bargaining was refused, he unreasonably chose to disbelieve them. Thus, we think good faith is directed only to timing:

> the reasonable grounds must be known at the time the refusal occurs. Motivation and subjective belief are irrelevant except as they may shed light on the sufficiency of the evidence. *See NLRB v. Vegas Vic, Inc.*, 546 F.2d at 829.

When motivation is an issue, evidence of a prior unfair practice is admissible.[26] Subjective motivation is not, however, an element of the reasonable doubt defense. Consequently, the evidence was inadmissible, and the alleged prior unfair practice did not constitute an objective ground for challenging the Union's bargaining status.[27]

The employers argue that placing on them the burden of refuting the presumption of majority status is unfair because the Union has superior access to the information regarding Union support. The effect, respondents conclude, is that they are forced to assume the risk of erroneous determinations. We agree: the employer usually does have inferior access to the relevant information and may risk further penalty in garnering additional data.[28] Yet we think the burden is fair.[29]

In refusing to bargain because of an alleged decline in union adherents, the employer is acting as vicarious cham-

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26. *United Packinghouse, Food & Allied Workers International Union v. NLRB*, 416 F.2d 1126, 1131 n. 8 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 903 (1969); *NLRB v. Patterson Mendhaden Corp.*, 389 F.2d 701, 702-03 (5th Cir. 1968); *NLRB v. Stafford Trucking, Inc.*, 371 F.2d 244, 246-47 (7th Cir. 1966); *Paramount Cap Mfg. Co.*, 260 F.2d 109 (8th Cir. 1958).

27. We appreciate this requires the employer to disregard evidence he may know to be true. But this consequence of the *Bryan Manufacturing* rule is equally applicable when the employer determines he can disprove the union's majority status or takes any other action in reliance on inadmissible evidence.

28. *NLRB v. Gissel Packing Co.*, 395 U.S. at 609-10; *Automated Business System v. NLRB*, 497 F.2d 262, 270-71 (6th Cir. 1974) (quoting *Stoner Rubber Co.*, 123 NLRB 1440); *see NLRB v. Fulfmont Hotel Co.*, 362 F.2d 588, 590-91 (5th Cir. 1966). *But see NLRB v. H. P. Wasson & Co.*, 422 F.2d 558 (7th Cir. 1970) (employee poll not coercive).

29. One factor contributing to our conclusion is that an objective construction of the reasonable doubt defense, as we have adopted herein, lightens the evidentiary burden imposed on an employer who is charged with an unfair labor practice.

pion of its employees, a role no one has asked it to assume.[30] The employees were free to petition for decertification; here, they never did. Respondents were also free to petition for an election, the preferred method for resolving majority disputes, but neither did until much later. When the employer chooses to unilaterally disrupt an established bargaining relationship without an election, the threat to industrial peace must be counterbalanced by good cause.[31] When the employer has doubts, the goal of the Act would be better served by filing an election petition.[32] Requiring the employer to show that his refusal to bargain was reasonable fairly allocates the burdens and concomitant risks.[33]

Respondents also argue the *Bryan Manufacturing* rule makes this an irrebuttable presumption. The argument confuses the presumption with its factual predicate. § 10(b) does preclude respondents from showing the Union was in the minority when the Union was first recognized, but the presumption pertains to the Union's majority at the time the employer refused to bargain. The presumption

30. "The underlying purpose of this statute is industrial peace. To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it."
Brooks v. NLRB, 348 U.S. at 103.
See NLRB v. Lee Office Equipment, 572 F.2d at 707.

31. *Retired Persons Pharmacy v. NLRB*, 519 F.2d at 490 (balance between industrial peace and free choice weighed differently when employer is asserting rights of its employees).

32. Although we recognize that an election petition may cause delay and create other practical problems, the election process is still preferable. *NLRB v. Gallaro*, 419 F.2d 97, 101 (2d Cir. 1969); *see Brooks v. NLRB*, 348 U.S. at 104 & n. 18.

33. *Retired Persons Pharmacy v. NLRB*, 519 F.2d at 491; *Zim's Foodliner, Inc. v. NLRB*, 495 F.2d 1131, 1139 (7th Cir. 1974), *cert. denied*, 419 U.S. 838 (1974) (burden on employer "not severe"); *See NLRB v. Gallaro* 419 F.2d at 101.

may be rebutted; the only fact conclusively established is the fact that triggers the presumption.

Respondents' reliance on *NLRB v. Heyman*, 541 F.2d 796 (9th Cir. 1976) is misplaced. There the contract had been invalidated by a prior judicial decree; therefore, the presumption was inapplicable.

> "Majority representation is not the issue in this case; but what was and is the issue is the effect of the district court rescission on the presumption of validity utilized by the Board."
> *Id.* at 800.

See Pioneer Inn Associates v. NLRB, #77-1825 (9th Cir., July 19, 1978). The Board cannot ignore a judicial decree; it must ignore evidence which the Supreme Court has held to be inadmissible.

WITHDRAWAL FROM THE UNIT

The next issue is whether the presumption survives dissolution of the multi-employer unit. Three interests embraced by the Act shape our decision:

1. employee free choice;
2. stability in bargaining; and
3. the deference we owe to Board expertise.

See Zim's Foodliner, Inc. v. NLRB, 495 F.2d 1131, 1140 (9th Cir. 1974), *cert. denied*, 419 U.S. 838 (1974). We conclude the Board did not abuse its discretion in balancing free choice and stability when it determined that, in this instance, freedom of choice must subserve the goal of industrial peace. *See id.* at 1138.

Multi-employer units are formed by mutual consent of union and employer. But their power is limited: voluntary recognition of a union which does not enjoy majority sup-

port in the single employer unit is an unfair labor practice. *See NLRB v. Local 210, International Brotherhood of Teamsters, etc.*, 330 F.2d 46 (2d Cir. 1964). Nevertheless, either party may withdraw from the multi-employer unit without ascertaining the effect on union majority in the respective units.

Relying on Member Walther's dissenting opinions, respondents assert the presumption is inapplicable once the employer withdraws from the multi-employer unit.[34] Since recognition was based on majority support within the larger unit, respondents argue, the factual predicate of the presumption, prior majority status, is inapposite when applied to the single employer unit. Respondents point out: no election was ever held; the Union was not recognized until the employers joined the Association; no separate contracts were signed; and withdrawal from the larger unit was timely. Under these facts, respondents conclude, the presumption is derivative, supported only by policy far-removed from actual fact; therefore, it should not be weighed heavily, if at all.

The reasoning of the Board majority persuades us that respondents' argument must fail. Respondents' argument misconstrues the presumption in two ways. First, the presumption is rooted in the employer's appraisal of union strength among its own employees. Second, the basis of the presumption is primarily policy, not probability; it is a vehicle for maintaining industrial peace.

In many instances, the presumption originates with an election among the employees of several employers. When the bargaining representative is chosen in a multi-employer-

34. In the alternative, respondents contend withdrawal provides sufficient reason for doubting the Union's majority. We find the arguments indistinguishable and discuss only the first.

unit election, the factual premise is derivative: majority status in the single employer unit is inferred from the union's victory in the multi-employer election. Although the inference is reasonable,[35] some reviewing courts have deemed it too speculative to support the presumption after the larger unit has dissolved.[36] Here, however, no election was held; the Union was voluntarily recognized.

When respondents joined the Association and recognized the Union, they implicitly declared their employees favored the Union. Thus, majority status can be directly inferred from the employer's own conduct; the presumption is not derived from the larger unit's majority, but originates with the employer's implicit declaration of a majority in the single employer unit. Moreover, the original factual inference is convincing: employers normally will not knowingly violate the law and union fraud is rare. Continued mem-

35. *See Zim's Foodliner, Inc. v. NLRB*, 495 F.2d at 1136-42; *NLRB v. Armato*, 199 F.2d 800 (7th Cir. 1952).

36. In *NLRB v. Richard W. Kaase Co.*, 346 F.2d 24 (6th Cir. 1965), the Sixth Circuit did hold that withdrawal from a multi-employer unit vitiated the presumption despite the existence of a separate contract between the union and Kaase. But in that case the union's position as exclusive bargaining representative of the Kaase employees originated with an election in the multi-employer unit. No evidence showed the Kaase employees themselves ever favored the union; thus, the fact of majority status in the single-employer unit had never been established, as it had been here by the employer's voluntary recognition. There were other distinguishing facts. The union, the court noted, controlled Kaase employees through a union security clause and represented them in a high-handed manner. Kaase had been sold to new owners, and the size of its work force had been halved. Also, the issue arose in the context of conflicting representational claims and blatant unfair labor practices by Kaase and the rival union.

The court specified its holding was limited to the unusual circumstances presented. Though we express no view on the holding, we distinguish it on these bases.

See also NLRB v. Downtown Bakery Corp., 330 F.2d 921 (6th Cir. 1964); *Ref-Chem Co. v. NLRB*, 418 F.2d 127 (5th Cir 1969).

bership in the larger unit does nothing to negate this principle even though the larger unit becomes the appropriate one for bargaining.[37] The original presumption subsists: withdrawal from the unit simply entails a reversion to the original unit, a unit previously determined from the employer's own conduct to favor union representation.

A secondary consideration supporting the presumption's continued vitality is its grounding in policy. By preserving the status quo, the presumption ensures the Act's most valued objective: industrial peace.[38] Respondents' assertion —that the inference of majority support based on voluntary recognition a decade before is too attenuated to survive withdrawal from the Association[39]—assumes the presumption is merely an evidential tool based wholly on probability. The presumption, however, also subsists for policy reasons.

Presumptions often function to further social, economic, or other policies, distinct from the fact presumed, C. McCormick, *Law of Evidence* § 343 (Cleary ed. 1972). *But See Ref-Chem Co. v. NLRB*, 418 F.2d 127, 128-29 (5th Cir. 1969). In assorted contexts, the Board has used presumptions to stabilize labor-management relations. Inasmuch as primary responsibility for reconciling the inherent conflict between employee rights and bargaining stability has been

37. There was no evidence that prior to withdrawal, respondents doubted the Union majority but continued to recognize the Union because of their membership in the larger unit which was then the appropriate unit for bargaining.

38. *See Brooks v. NLRB*, 348 U.S. 96 (1954).

39. As a factual matter, this assertion presents a close question. The sentiments of the present employees have never been tested. On the other hand, they have not objected to the Union's representation by filing a decertification petition. See The Employer's Evidence, *infra*.

entrusted to the Board, we determine only whether adoption of the presumption strikes a fair balance.[40]

In the single-employer context, the balance struck by the Board has been approved by the Supreme Court even though majority support was not demonstrable. *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972).[41] As stated previously, the presumption here, though perhaps distinguishable, stems from the single employer unit. Other circuits have approved Board presumptions in analogous circumstances when majority support was not readily deducible. *E.g., Zim's Foodliner, Inc. v. NLRB*, 495 F.2d at 1136-38. *See also Frank Bros. Co. v. NLRB*, 321 U.S. 702 (1944). The Board may have concluded that the potential for abuse inherent in the employer's right to unilaterally withdraw from the Association justifies the incursion on employee freedom.[42] If an employer could routinely negate the presumption of union majority status by withdrawing from a bargaining association, unions might refuse to consent to multiple party bargaining and this effective device for promoting industry-wide peace

40. *See NLRB v. Local Union No. 13, International Ass'n of Bridge, Structural and Ornamental Iron Workers, AFL-CIO*, 98 S.Ct. 651, 660 (1978); *cf. Daisy's Originals, Inc. of Miami v. NLRB*, 468 F.2d at 503 (responsibility for balancing employee freedom against need to remedy effects of employer misconduct is Board's, subject to judicial review).

41. In *Burns* a successor employer hired 27 employees from the previous unit and added 15 new employees. Less than four months before, an election in the prior unit had been held and a bargaining representative certified. The court held the one-year irrebuttable presumption applied despite the change in employers and make-up of the unit.

42. In *Nevada Lodge*, withdrawal from the Association was motivated, in part, by the belief that pockets of Union strength within the Association might sustain the Union's overall majority. Under respondents' view, the employer could threaten withdrawal to enhance its bargaining power or could disrupt an established bargaining relation to undermine union authority.

would be lost. Since industrial peace is no less desirable in multi-employer units and the election alternative is available to both employer and employee, we think the Board has not abused its discretion.

THE EMPLOYERS' EVIDENCE

Both the Administrative Law Judge and the Board found respondents had failed to introduce evidence sufficient to support a reasonable doubt. The credibility determinations made by the Administrative Law Judge and approved by the Board were fully warranted; in fact, conflicts in the evidence were rare, and virtually all of the testimony was credited. We pay great deference to the inferences drawn by the Board from the credited testimony because Board members' expertise and experience in labor-management relations is an invaluable asset to the task.[43] Nonetheless, derivate inferences which are tenuous, irrational, or unwarranted do not constitute substantial evidence and will be overturned on appeal. *Penasquitos Village, Inc. v. NLRB,* 565 F.2d 1074, 1079 (9th Cir. 1977).

Seven factors relied upon by respondents are discussed below. They are:

1. employee discontent,
2. turnover,
3. union inactivity,
4. low membership,
5. financial difficulties of the union,
6. bargaining history, and
7. admissions.

After analyzing each individually, their combined effect is considered. We note at the outset that in most decisions

43. *Penasquitos Village, Inc. v. NLRB,* 565 F.2d 1074, 1079 (9th Cir. 1977); *see NLRB v. Miller Redwood Co.,* 407 F.2d 1366, 1369 (9th Cir. 1969).

upholding the reasonable doubt defense the employer could point to at least one factor which was clearly referable to a decline in union support.[44] In many instances, this factor alone did not constitute sufficient evidence to justify the refusal to bargain, but did provide an unequivocal tie between the other evidence and the ultimate fact—whether union support had dwindled to a minority.[45]

All of the factors established by respondents are equivocal. They may represent a loss of union support, yet may be explained by other reasons. For example, low membership may show the union is losing support as bargaining representative, or it may simply indicate unwillingness to participate in union activities. The Board has consistently held that no single equivocal factor is sufficient to sustain the good faith doubt defense, but that each will be accorded some weight when the total effect of the evidence is assessed.

When the Board looks to the cumulative force of the evidence, the factors are reconsidered and weighed against the force of the presumption. If unexplained, the cumulative inferential weight of these equivocal factors might suffice to establish that the refusal to bargain was reasonable.[46] Derivate inferences of union minority status cannot

44. *E.g., National Cash Register Co. v. NLRB,* 494 F.2d 189 (8th Cir. 1974) (decertification petition); *NLRB v. Gallaro,* 419 F.2d 97 (2d Cir. 1969) (7 of 10 employees petitioned for decertification); *Lodges 1746 & 743, etc. v. NLRB,* 416 F.2d 809 (D.C. Cir. 1969) (union admission that majority support lacking). *See also NLRB v. Cornell of California, Inc.,* #76-1545 (9th Cir., June 14, 1978) (reliance on "identifiable acts" of majority preferred).

45. *See, e.g., Dalewood Rehabilitation Hospital, Inc. v. NLRB,* 566 F.2d 77, 80 (9th Cir. 1977).

46. But we have found no cases in which the reasonable doubt defense was sustained based solely on equivocal evidence. Common to each case was the presence of at least one factor clearly referable to a lack of majority support.

be disregarded upon mere speculation; to ignore their cumulative effect would be irrational and unwarranted. We do not say the Board has deviated from its stated policy here, but merely outline the proper steps to ensure they are followed.

In reviewing the facts, we are guided by several evidentiary considerations:

1. Evidence manifesting declining union support is more pertinent than evidence showing union support is low.
2. In gauging union support, the employer is often without direct evidence of minority status, and therefore he may properly rely on reasonable inferences from the available information. But that does not justify wishful speculation on the employer's part.
3. When information signifying lack of union support would be readily available if union support had eroded, an insubstantial showing by the employer may be convincing proof the union has majority support.
4. When the employer has consistently demonstrated impartiality regarding employee representation, his decision may be some evidence that the grounds relied on are reasonable.

With these thoughts in mind, we examine the particular facts before us.

1. Employee Discontent

Reports of employee complaints about the Union were one reason asserted by respondents for deciding the Union was in the minority. Much of the evidence to show employee dissatisfaction with the Union was speculative, conjectural, and vague. Often it was hearsay or based on management's

evaluation of employee sentiment. Its probative weight is accordingly slight.[47]

The dissatisfaction testified to here did not, for the most part, amount to repudiation.[48] Many an employee complains of his job without ever contemplating quitting, and remarks to management may be affected by a desire to curry the employer's favor.[49] Absent other activity which would confirm that the reported complaints were expressions of repudiation, the two cannot be equated.[50] Here, the complaints were not vociferous, a petition for decertification had not been filed, and no organized opposition to the Union had formed.[51] Furthermore, the number of discontented employees was insubstantial.[52]

In summary, the evidence was unreliable and the inference from it tenuous. Consequently, we afford it almost no

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47. *See Terrell Machine Co. v. NLRB*, 427 F.2d 1088 (4th Cir. 1970), (reliance on vague, unidentified reports of employee discontent unwarranted); *Allied Industrial Workers, AFL-CIO Local Union No. 289 v. NLRB*, 476 F.2d 868, 881-82 (D.C. Cir. 1973).

48. The evidence in *Nevada Lodge* was stronger; some of it could be characterized as a repudiation of the Union's representation. An overly-stringent, technical definition of what statements constitute repudiation serves no purpose. The evidence must be evaluated with common sense and an appreciation for its context. We doubt employees often explicitly declare, "I repudiate the union."

49. Some of the complaining employees were dues-paying Union members or subsequently joined the Union.

50. *See Retired Persons Pharmacy v. NLRB*, 519 F. 2d 488, 490 (2d Cir. 1975); *cf. NLRB v. Frick Co.*, 423 F.2d 1327, 1333-34 (3d Cir. 1970) (strikers return to work equivocal; Board to determine if, under all the circumstances, return indicates abandonment of union).

51. *See Royal Typewriter Co. v. NLRB*, 533 F.2d 1030, 1036-37 (8th Cir. 1976) (anti-union committee deemed objective evidence supporting employer's reasonable doubt).

52. *See NLRB v. A. W. Thompson*, 525 F.2d 870, 873 (5th Cir. 1976), *cert. denied*, 429 U.S. 818 (1976); *NLRB v. Little Rock Downtowner, Inc.*, 414 F.2d 1084, 1092 (8th Cir. 1969).

weight.[53] The absence of more concrete evidence of employee discontent, particularly the filing of a decertification petition, is actually more persuasive.

2. Turnover

Respondents assert there is no basis for concluding that the present complement of employees shares the same attitude towards union representation as held by their predecessors a decade before. The annual turnover was consistently high for both employers. Thus, the work force at the time of the employers' refusal was completely different.[54]

High turnover, by itself, is insufficient to justify a refusal to bargain except when caused by employee discontent with the union.[55] The Board has adopted a presumption that new employees support the union in the same ratio as their predecessors.[56] Despite the legitimacy of this presumption, high turnover can be considered when other factors show declining union adherency.[57]

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53. *See* Seger, *supra* note 25, at 992-93.

54. *See NLRB v. King Radio Corp.*, 510 F.2d 1154 (10th Cir. 1975), *cert. denied*, 423 U.S. 839 (1975), where the number of employees had risen to 876 from 343 and in a five-year period since certification, 4214 persons had been hired and 3423 terminated. The court held the turnover did not afford reasonable grounds for doubting the union's majority. *Id.* at 1156.

55. *NLRB v. Little Rock Downtowner, Inc.*, 414 F.2d at 1091. This is particularly true when high turnover is prevalent in the industry. *NLRB v. A. W. Thompson, Inc.*, 525 F.2d at 872; *NLRB v. Hondo Drilling Co., N.S.L.*, 525 F.2d 864, 868-69 (5th Cir. 1976), *cert. denied*, 429 U.S. 818 (1976); *see NLRB v. Hondo Drilling Co.*, 428 F.2d 943 (5th Cir. 1970).

56. This presumption can be rebutted, for example, by showing a decline in the ratio of checkoffs to pro-union votes. *See Ingress-Plastene, Inc. v. NLRB*, 430 F.2d 542, 546 n. 6 (7th Cir. 1970).

57. *Teamsters Local Union 769 v. NLRB*, 532 F.2d 1385, 1390 (D.C. Cir. 1976) (dictum); *Star Mfg. Co. Division of Star Forge, Inc. v. NLRB*, 536 F.2d 1192, 1195-96 (7th Cir. 1976).

3. Union Inactivity

In the years immediately preceding respondents' refusal to bargain, the Union had not processed any grievances. The significance of this fact is questionable, since there was no testimony showing any grievances were warranted.[58] When, as here, the union and the employer have established an amicable relationship over several years, contract violations may be the exception. Witnesses for both employers testified they abided by the collective bargaining agreement and were unaware of any contract violations.

There was, however, other evidence of Union inactivity. Union agents inspected the business premises infrequently. No employees attended a meeting called by the Union[59] in the spring of 1974. Yet there is no evidence the Union failed to fulfill its responsibilities under the contract or breached its duty of fair representation.[60] Union inactivity is an objective ground which may contribute to an employer's conclu-

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58. When Respondent Nevada Lodge decided to enforce the company's anti-nepotism policy, the Union effected the rehire of five of the seven employees discharged. When employees complained that their ten-minute breaks and half-hour lunches were not being provided, the Union filed a grievance with the Nevada Labor Commission. The grievance was subsequently resolved.

After the refusal to bargain, two written grievances were filed by the Union. This evidence, of course, is irrelevant.

59. This was a meeting of all employees in the Lake Tahoe area. When the Union called a meeting to discuss matters affecting Nevada Lodge employees, fifteen or eighteen employees attended (see n. 16, *supra*). *Cf. NLRB v. Nu-Southern Dyeing & Finishing, Inc.*, 444 F.2d 11 (4th Cir. 1971) (only 2 of 140 employees attended union meetings and only 2 plant visits by union: good faith doubt found to exist, but finding premised on filing of petition for decertification).

60. The Union negotiated successive bargaining agreements with the Association; there was no evidence the Union had ever been charged with an unfair labor practice by respondents or any employees.

sion that union support is lacking,[61] but the showing here was de minimis.

4. Low Membership

Among bar and culinary employees in the Tahoe basin, Union membership was relatively low. For several reasons, this evidence is only marginally relevant.[62] Low membership was never tied to respondents' employees. Also, employees may favor union representation, but choose not to join, *NLRB v. Vegas Vic, Inc.*, 546 F.2d 828 (9th Cir. 1976), *cert. denied*, 98 S.Ct. 57 (1978); this disparity is emphasized in a right-to-work state, such as Nevada. *See Terrell Machine Co. v. NLRB*, 427 F.2d 1088, 1090 (4th Cir. 1970), *cert. denied*, 398 U.S. 929 (1970).

5. Financial Difficulties of the Union

During 1974, the Union was placed in trusteeship, and a campaign to organize more workers was launched. This says little about support within the subject units. The Union was solvent. Its financial problems may have stemmed from overextension without sufficient financial support. Employees who desire representation may be unwilling to pay for it. The organizational campaign only shows a desire for more members, either within the units represented or from units as yet unrepresented. The record shows the Union undertook the campaign because higher membership would help the Union at the bargaining table; thus, the expanded

61. *E.g., Ingress-Plastene v. NLRB*, 430 F.2d 542 (7th Cir. 1970) (union processed none of 32 grievances filed, failed to recommend promotions or designate employees for super-seniority, and abdicated its responsibilities regarding safety in the workshop).

62. The obverse is also true: high membership may be an unreliable barometer of pro-union sentiment. *See Teamsters Local Union 769 v. NLRB*, 532 F.2d at 1390.

organizing efforts were proper Union activity on behalf of the employees it then represented.

6. Bargaining History

Relations between the Union and employer were amicable for many years. By deemphasizing subjective motivation, we concomitantly discount the importance of this factor. Seger, *supra* note 25, at 994. Nonetheless, it may show the employer's decision was impartial and, by inference, reasonable.

The history of employee-union ties may be more significant. There was no evidence here of employee-led challenges to the Union's representation or of abdication by the Union.

7. Admissions

Neither the Union nor the employer had made damaging statements about their assessments of Union support.[63] In *Nevada Lodge*, respondent's attorney was "to use any necessary method to get us disassociated from the union." This fact may be helpful in evaluating credibility, and it does imply subjective bad faith. Since the evidence was generally credited and this is not the unusual case where subjective motivation is an important factor, we find this evidence insignificant.[64]

63. The testimony of Alfred Staff, President of the Union, from July 1973 to June 7, 1974, was material only to the question of the Union's actual majority; respondents were apparently unaware of the facts testified to by Staff when they refused to bargain.

64. Another ground relied on by respondents was that the collective bargaining agreement did not contain a clause authorizing dues checkoffs or a union security clause. This only confirms the Union lacked bargaining power with the employers, a fact the Union admitted.

Respondents also contend the reduction in unit size consequent on withdrawal from the Association should be considered. Reduction

8. Cumulative Effect of the Evidence

None of the evidence is wholly referable to a decline in Union support within the relevant units. Most of the evidence indicates the Union had equivocal support in the Lake Tahoe area. Some of the evidence is subjective; the inferences of loss of Union support are ambiguous. Before unilaterally disrupting the bargaining relationship, an employer must obtain more reliable evidence of lost support.

We therefore affirm the Board's determination that respondents violated sections 8(a)(1) and (5) of the Act by refusing to bargain with the Union. After considering the record as a whole, we also affirm the Board's finding that respondent Nevada Lodge independently violated § 8(a)(1) by unilaterally changing working conditions to induce its employees to abandon the Union.

The Board's Orders are enforced.

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in unit size is not sufficient to justify a refusal to bargain, *Zim's Foodliner, Inc. v. NLRB*, 495 F.2d at 1140, and in light of the presumption's relation to the single employer unit discussed previously, this fact does not contradict the inference of majority support.

Appendix B

Filed October 20, 1978

EMIL E. MELFI, JR.
Clerk, U.S. Court of Appeals

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, *Petitioner,* vs. TAHOE NUGGET, INC., d/b/a JIM KELLEY'S TAHOE NUGGET, *Respondent,* HOTEL, MOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS' UNION, LOCAL 86, *Intervenor.*	No. 77-2095
NATIONAL LABOR RELATIONS BOARD, *Petitioner,* vs. NEVADA LODGE, *Respondent,* HOTEL, MOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS' UNION, LOCAL 86, *Intervenor.*	No. 77-2105

ORDER

Before: TRASK and ANDERSON, Circuit Judges, and GRANT*, District Judge

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*The Honorable Robert A. Grant, Senior United States District Judge for the Northern District of Indiana, sitting by designation.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1379
Docketed March 9, 1979

TAHOE NUGGET, INC. d/b/a JIM KELLEY'S TAHOE NUGGET,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

NEVADA LODGE,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Supplemental Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Appendix C(1)

227 NLRB No. 72

MFJPW
D—1508
Crystal Bay, Nev.

United States of America
Before the National Labor Relations Board

Tahoe Nugget, Inc. d/b/a
Jim Kelley's Tahoe Nugget
and Case 20—CA—9738
Hotel-Motel-Restaurant Employees
& Bartenders Union, Local 86,
Hotel & Restaurant Employees &
Bartenders International Union, AFL CIO

DECISION AND ORDER

On January 28, 1976, Administrative Law Judge Richard D. Taplitz issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief. General Counsel and the Charging Party filed briefs in opposition to the exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and briefs[1] and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended

1. Respondent's request for oral argument is hereby denied, as the record and the briefs adequately present the issues and the positions of the parties.

Order, but for the reasons set forth below rather than for the reasons set forth in his Decision.

On August 3, 1959, the Reno Employers Council, a voluntary association of employers engaged in the casino, restaurant, and other industries, recognized and entered into a contract with Local 86 on behalf of its member-employers in the Lake Tahoe area. Respondent, Tahoe Nugget, thereafter in 1962 joined the Council and became a party to the 3-year multiemployer contract then existing between the Council and Local 86. Respondent continued to be a party to successive contracts between the Council and Local 86, including one that was due to expire on November 30, 1974.

On September 18, 1974, Respondent timely withdrew from the multiemployer arrangement and subsequently refused to bargain with Local 86, claiming that it had a reasonably grounded doubt as to Local 86's majority status among its own employees.

We agree with the Administrative Law Judge that the presumption of majority arising from the Respondent's voluntary recognition of a labor organization as the exclusive collective-bargaining representative of its employees continued after its withdrawal from a multiemployer unit and reversion to its original status. We nevertheless take this opportunity to clarify and precisely define our rationale for so joining in the Administrative Law Judge's conclusion.

Unless a majority of an employer's employees desire representation by a union, an employer cannot lawfully force representation on them by joining a multiemployer bargaining unit.[2] Respondent would thus have violated the Act when it became a party to its multiemployer contract if a

2. *Mohawk Business Machines Corporation*, 116 NLRB 248 (1956); *Dancker & Sellew, Inc.*, 140 NLRB 824 (1963), enfd. 330 F.2d 46 (C.A. 2, 1964).

majority of its employees had not desired representation by Local 86.

The Board has held, in light of the Supreme Court's decision in *Bryan Manufacturing Co.*,[3] that a respondent may not defend against a refusal-to-bargain allegation on the ground that original recognition, occurring more than 6 months before charges had been filed in the proceeding raising the issue, was unlawful.[4] Any such defense is barred by Section 10(b) of the Act, which, as the Court explained in *Bryan*, was specifically intended by Congress to apply to agreements with minority unions in order to stabilize bargaining relationships. That means that the Respondent cannot now attack the Union's majority status among its employees in the single-employer unit when recognition was originally extended and that we must accept as a fact that the Union represented a majority in that unit at that time.

The Board has consistently presumed that a voluntarily recognized union continues to be the majority representative of the unit employees.[5] This presumption is carried throughout the life of the collective-bargaining contract and thereafter. We do not think that a different result should obtain in this case.[6]

3. *Local Lodge No. 1424, International Association of Machinists, AFL-CIO* [*Bryan Manufacturing Co.*] *v. N.L.R.B.* 362 U.S. 411 (1960).

4. *North Bros. Ford, Inc.*, 220 NLRB No. 154 (1975), and cases cited therein.

5. *Shamrock Dairy, Inc., Shamrock Dairy of Phoenix, Inc., and Shamrock Milk Transport Co.*, 119 NLRB 998 (1957), and 124 NLRB 494 (1959), enfd. 280 F.2d 665 (C.A.D.C., 1960), cert. denied 364 U.S. 892 (1960); *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Association of Pocatello, Idaho and its Employer-Members*, 213 NLRB 651 (1974) (Member Kennedy dissenting).

6. We think our dissenting colleague reads too much into *Sheridan Creations, Inc.*, 148 NLRB 1503 (1964), and *Mor Paskesz*, 171

To rebut the presumption of continued majority status properly, the employer must show either that the union in fact no longer enjoys majority status or that its refusal to bargain was predicated on a reasonably grounded doubt as to the union's continued majority status.[7] If the employer desires to challenge the union's majority status, it may file a petition with the Board seeking an election. To hold otherwise, as does our dissenting colleague, would mean that formation or dissolution of, or any entry into or departure from, a multiemployer unit would, standing alone, establish objective and substantial reason to doubt the previously existing majority. But the dissent sets forth neither facts nor reasons why this should be the result. Such result would permit the questioning of majority on every change in the composition of the multiemployer unit, would deter the formation of such units, and would inhibit stability in bargaining. Before we depart from precedent to venture in this direction, far more cogent reasons are required than we perceive here.[8]

Since we are in agreement with the Administrative Law Judge that Respondent has failed to prove that Local 86 no longer in fact enjoys majority status or that Respondent's refusal to bargain was predicated on a reasonably grounded doubt as to Local 86's majority status, we find that Respondent has violated Section 8(a)(5) and 8(a)(1) of the Act by refusing to recognize and bargain with the Union.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Tahoe Nugget, Inc. d/b/a Jim Kelley's Tahoe Nugget, Crystal Bay, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

NLRB 116 (1968), which involved the lawfulness of the employers' withdrawal from multiemployer bargaining units. There the Board held that, until the employers timely withdrew from the multiemployer unit, their bargaining obligations were based on the majority status of the union representing all the employees in the unit. This holding was grounded on the principle that the multiemployer unit, once established, remains the appropriate unit for all the employees and employers until lawfully disestablished or modified. These cases, therefore, say nothing about the presumption of majority status existing originally among the employees of each employer. Once an employer lawfully withdraws from the unit, of course, it is free to justify a withdrawal of recognition by successfully rebutting the presumption.

7. See *Celanese Corporation of America*, 95 NLRB 664 (1951); *Laystrom Manufacturing Co.*, 151 NLRB 1482 (1965), enforcement denied on other grounds 359 F.2d 799 (C.A. 7, 1966); *Terrell Machine Company*, 173 NLRB 1480 (1969), enfd. 427 F.2d 1088 (C.A. 4, 1970), cert. denied 398 U.S. 929 (1970); *Barrington Plaza and Tragniew, Inc.*, 185 NLRB 962 (1970); *Automated Business Systems, a Division of Litton Business Systems, Inc., a Subsidiary of Litton Industries, Inc.*, 205 NLRB 532 (1973), enforcement denied 497 F.2d 262 (C.A. 6, 1974); *Walter E. Heyman d/b/a Stanwood Thriftmart*, 216 NLRB No. 154 (1975); *James W. Whitfield d/b/a Cutten Supermarket*, 220 NLRB No. 64 (1975).

8. The presumption that a bargaining relationship, lawfully established, lawfully continues is embedded in the statute and precedent. Unrepresented and represented employees are both presumed to desire continuation of the existing status in the absence of proof to the contrary. Were there objective evidence here sufficient to raise a reasonable doubt of the Union's continuing majority, there would be no need to consider the propriety of any presumption. Although, as our colleague argues, had the Union lost its majority among the employees of any single employer it could nonetheless have compelled bargaining in the multiemployer unit, he suggests no reason to believe that it had lost that majority. At best, his argument begs the question, and replaces the common expectation of continuity with one of change.

Dated, Washington, D.C. December 16, 1976

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Betty Southard Murphy, Chairman

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John H. Fanning, Member

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Howard Jenkins, Jr., Member

.....

John A. Penello, Member

National Labor Relations Board

(SEAL)

Member Walther, dissenting:

I take issue with my colleagues' conclusion that the presumption of majority status flowing from the contract in the multiemployer unit survives Respondent's timely withdrawal from that unit. By a process resembling alchemy, my colleagues have concocted the existence of majority status with only the thinnest support in legal reason and have, in complementary fashion, ignored valid distinctions between the presumptions applicable to single-employer and multiemployer units.

It was some 14 years ago that the Respondent in 1962 voluntarily joined a multiemployer bargaining unit and recognized Local 86 to be the representative of its employees. No election has ever been held either in the multiemployer unit or in a unit of Respondent's own employees, nor has Respondent ever recognized or bargained with Local 86 on a single-employer basis. Thus, at no time during the course of Respondent's 14-year bargaining relationship has there been any attempt to ascertain the

majority sentiments of Respondent's employees. I cannot accept my colleagues' assertion that in these circumstances Local 86 should be presumed to be the majority representative of Respondent's employees once Respondent secedes from the multiemployer unit.

My colleagues argue that unless a majority of Respondent's employees in 1962 desired representation by Local 86 Respondent could not lawfully have forced representation on them by joining the multiemployer unit. They further note that Respondent cannot now attack Local 86's majority status among its own employees at the time of original recognition because of Section 10(b). From this my colleagues, citing cases which deal with the presumption of majority status in single-employer units, construct two entirely distinct and severable presumptions which in turn give birth to yet a third presumption. Starting with (1) a valid presumption of majority status in the multiemployer relationship, they turn back, and (2) interweave a second presumption of former majority status in the single-employer unit based upon the 10(b) prohibition against finding conduct which occurred years ago to be unlawful. From the interweaving of these two presumptions the majority manages to cenceive yet a third presumption of current majority status in the single-employer unit which otherwise has no basis in fact or in logic. While I do believe that the Board can and should base violations of Section 8(a)(5) upon legitimate legal presumptions, a violation predicated upon a presumption arising not out of fact but out of the intermarriage of two other presumptions is, in my view, not a proper basis upon which to establish a violation. It must never be forgotten that an 8(a)(5) finding effectively prevents employees from exercising their right to a free choice in the selection of a collective-bargaining

representative—a right these employees have never had an opportunity to exercise.

My colleagues' argument conveniently ignores the critical fact that, contrary to the situation in a single-employer unit, the relevant majority in a multiemployer unit is the majority of employees within the entire multiemployer unit.[9] Thus, notwithstanding the constraints imposed on the employer at the point of initial recognition (constraints which may perhaps support a presumption that the union was majority representative of the employer's employees at the time of original recognition), *once* the employer joins the multiemployer unit, it does not in theory violate the law by continuing to bargain with a union which does not have majority status among its own employees. Indeed, unless the employer has timely withdrawn from the multiemployer unit, it is required to bargain with any union representing a majority of employees within that multiemployer unit, regardless of the union's standing among the employer's own employees.[10] Consequently, the presumption of continued majority in the multiemployer situation provides no basis in fact or in law for a presumption of majority in the single-employer unit, since the former presumption exists regardless of, or even contrary to, actual majority status on a single-employer basis.

It should be recognized that the presumption of continued majority status is in fact nothing more than a convenient legal fiction employed by the Board to insure the stability of the collective-bargaining relationship by preventing frivolous and unnecessary interruptions of that relationship. As stated by the Board in *Terrell Machine Company*, "[t]his presumption is designed to promote stability in collective-bargaining relationships, without impairing the free choice of employees."[11]

Since they are essentially legal fictions, however, presumptions should not be employed where they fail utterly to mirror reality (as when the probability of the fact presumed to be in existence diminishes to nothingness) or when their use comes up against some important countervailing policy consideration (such as employee free choice). In my opinion, the majority has here extended an acceptable and useful fiction (the presumption of continued majority status) to the point where it no longer reflects probable reality and, instead of promoting bargaining stability, works to the detriment of employee free choice.

While Respondent did not engage in any potentially improper interrogation of its employees, it did place in the record the evidence available to it supporting its position that there is a doubt as to the Union's majority status. This included: (1) evidence of Local 86's poor financial picture, (2) associationwide figures concerning Local 86 membership, (3) newspaper reports that Local 86 was reorganizing, (4) evidence of a high employee turnover rate, (5) reports of employee dissatisfaction with Local 86, and (6) reports of Local 86's inactivity. Clearly the record does not support any finding of bad faith on the part of Respondent in doubting Local 86's majority status.

I would accordingly refuse to presume that Local 86 continues to be majority representative of Respondent's employees and would require Local 86 to come forward with its own evidence of majority. As Local 86 has not done so, I would dismiss the complaint, thereby leaving the parties

9. *Sheridan Creations, Inc.*, 148 NLRB 1503 (1964), enfd. 357 F.2d 245 (C.A. 2, 1966), cert. denied 385 U.S. 1005 (1967); *Mor Paskesz*, 171 NLRB 116 (1968).

10. See *Sheridan Creations, Inc., supra.*

11. 173 NLRB 1480, 1481 (1969).

and, most importantly, the employees to the Board's representation procedures if there exists a question concerning representation in the single-employer unit.

Dated, Washington, D.C. December 16, 1976

Peter D. Walther, Member
National Labor Relations Board

Appendix C(2)

JD-(SF)-19-76
Crystal Bay, Nev.

United States of America
Before the National Labor Relations Board
Division of Judges
Branch Office
San Francisco, California

Tahoe Nuggett, Inc. d/b/a
Jim Kelley's Tahoe Nugget
and Case No. 20-CA-9738
Hotel-Motel-Restaurant Employees &
Bartenders Union, Local 86, Hotel &
Restaurant Employees & Bartenders
International Union, AFL-CIO

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William W. Wertz, Attorney,
of San Francisco, Calif., for Respondent.
Davis, Cowell & Bowe by *Richard G. McCracken,*
Attorney, of San Francisco, Calif.,
for the Charging Party.

DECISION

Statement of the Case

Richard D. Taplitz, Administrative Law Judge: This case was tried in South Lake Tahoe, California, on Sep-

tember 23, 24 and 25, 1975. The charge was filed on November 19, 1974, by Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, herein called the Union. The complaint issued on August 13, 1975, and alleges that Tahoe Nuggett, Inc. d/b/a Jim Kelley's Tahoe Nugget, herein called Respondent, violated Sections 8(a) (5) and (1) of the National Labor Relations Act, as amended.

Issues

The ultimate issue is whether Respondent violated Sections 8(a)(5) and (1) of the Act by withdrawing recognition from and refusing to bargain with the Union as the collective-bargaining representative of its bar and culinary employees. The subsidiary issues are:

1. Whether the rebuttable presumption of the Union's continued majority status which flowed from a contract in a multi-employer bargaining unit survived Respondent's timely withdrawal from that unit and was applicable to a single employer bargaining unit.

2. If the presumption did apply, whether Respondent has rebutted that presumption by affirmatively establishing that the Union had, in fact, lost its majority or by showing that Respondent had sufficient objective basis for reasonably doubting the Union's continued majority.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel, Respondent and the Charging Party.

Upon the entire record of the case and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. The Business of Respondent

Respondent is a corporation engaged in the operation of a gaming casino at Crystal Bay, Nevada. During the year immediately preceding issuance of complaint, Respondent's gross revenue were in excess of $500,000, and during that same year, Respondent purchased and received goods and materials valued in excess of $10,000, which directly originated outside of Nevada. In addition to employing gaming control personnel, Respondent in its busy season employs about 52 employees in its bar and culinary operation. In its low season, Respondent employs about 35 or 40 employees in that group. The culinary classifications include cooks, waitresses, busboys, bartenders and porters. Thus, it appears that Respondent, in addition to operating a gaming casino, has bar and restaurant facilities.[1]

Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act, and will effectuate the policies of the Act for the Board to assert jurisdiction. See *The Anthony Company d/b/a El Dorado Club,* 220 NLRB No. 152 and cases cited therein.

II. The Labor Organization Involved

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *The Background*

The Reno Employers Council, herein called the Association, is a Nevada corporation with an office in Reno, Nevada.

1. In a petition for an election filed by Respondent, it describes its type of establishment as "food service and gaming casino".

It is a voluntary association of employers engaged in the casino, restaurant and other industries. The Association exists, in part, for the purpose of representing its member-employers in collective bargaining and administering collective-bargaining agreements with various labor organizations including the Union. The Union and the Association entered into a multi-employer collective-bargaining contract on August 3, 1959. The Association agreed to the contract on behalf of employers it represented in the Lake Tahoe area. Succeeding contracts followed,[2] with the last effective from December 1, 1971, through November 30, 1974.[3] That contract was between the Union and the Association on behalf of the individual members thereof signatory thereto. Five employers were signatory to the contract, including Respondent.[4] Employees covered by that contract were those in the employers' bar and culinary operations at Lake Tahoe.

Respondent opened for business on July 2, 1962. Respondent joined the Association and became a party to the multi-employer bargaining agreement between the Association and the Union that was effective from November 30, 1962, through November 30, 1965. Respondent continued to be a party to the successive contracts through the one that expired on November 30, 1974.

On September 18, 1974, Respondent timely withdrew its membership from the Association.[5] On October 23, 1974,

2. In some of these contracts new employer-members of the Association were added and other employers were deleted.

3. Nevada is a right to work state and none of the contracts contain a union-security clause.

4. The signatory employers were Barney's Club, Harvey's Resort Hotel, Nevada Lodge, Sahara-Tahoe and Respondent.

5. The General Counsel concedes in its complaint that the withdrawal was timely.

Respondent refused to bargain with the Union, and Respondent has withdrawn recognition from the Union. On July 25, 1975 Respondent filed a petition for an election with the Board. That petition seeks an election among Respondent's culinary and bartender employees in a single-employer unit. The complaint alleges a refusal to bargain in that single-employer unit. The complaint alleges, the answer admits, and I find that the appropriate bargaining unit is:

> All employees employed by the Respondent in its bar and culinary operations at its Crystal Bay, Nevada operations, excluding all other employees, guards and supervisors as defined in the Act.

B. *The Testimony*

1. The testimony of Staff and the LM-2 forms

Alfred E. Staff is the bar manager for the Overland Hotel in Reno. From early July 1973 to June 7, 1974, when a trusteeship was imposed on the Union, Staff was president of the Union.[6] During that time, Staff, in addition to being Union President, was a full-time bartender. The only full-time paid union officer was Secretary-Treasurer and Business Manager E. W. Tucker. Staff testified that a number of events occurred during the summer of 1974. However, it is apparent that these events took place before the trusteeship was imposed, and the sequence of events set forth below is keyed to the June 7 imposition of the trusteeship. Otherwise, the following findings are based on Staff's credited testimony. In June 1974, the Union had about $11,000 in its treasury, and that amount was decreasing. However,

6. Staff was unsure on his dates. He averred that he believed the trusteeship was imposed in August, but that it might have been in June. Howard Lawrence, a business representative who is the chief executive officer of the Union in the Lake Tahoe area, testified that the trusteeship was imposed on June 7, 1974. I credit Lawrence.

the Union's liabilities did not exceed its assets. About that time, the Union had approximately 1,000 members, of whom between 700 and 800 were paid up in their dues.[7] Sometime before the trusteeship was imposed, the Union sent Business Manager Tucker to the headquarters of the International in Cincinnati to see if he could obtain some money to help the Union organize. The executive committee had discussed the need to obtain more members and to build the membership up to a point where the Union could have some strength when it met with the employers to negotiate the next contract. Tucker went to Cincinnati and discussed the matter with representatives of the International. He then returned and reported to the executive committee that the International would give the Union money to organize if the officers resigned, the Union went into a trusteeship, and the International administered the Union. The executive committee decided to let the International take over. The matter was brought up at the next regular meeting of the Union, and a majority of the membership voted to accept the trusteeship. The officers resigned, and on June 7 1974, the trusteeship was imposed. Al Bramlet was appointed international trustee and former Business Manager Tucker became his assistant.

During the time that he was president, Staff spoke to some Union bartenders that he worked with at the Overland Hotel, and he received comments from them to the effect that they were discouraged with the Union, that the Union didn't do anything for them, and that they did not like the way the Union was being run. Some bartenders said, "when is the Union going to be able to do anything for us," "they never do nothing for us," "what's the sense of joining a

7. The highest number of members during Staff's term of office was about 1,200.

union." He never received any compliments on the performance of the Union. In addition to talking to bartenders at the Overland Hotel, he spoke to some culinary workers at various clubs in the Reno area in an attempt to organize them. However, there is no evidence in the record that any employees of Respondent expressed dissatisfaction with the Union to Staff.

At the end of the trial, Respondent offered in evidence certain LM-2 forms for the years 1972 through 1974 which the Union had filed with the Department of Labor. Those exhibits were received in evidence. No testimony was offered to explain or interpret the exhibits. The report for 1974 states that the Union was placed under an international trusteeship on June 7, 1974, and that Bramlet was appointed international trustee. The reports show that the Union received $84,891 in dues in 1974; $74,142 in 1973; and $77,117 in 1972.

There is no evidence in the record that Respondent knew of the existence of the LM-2 forms at a time when it decided to withdraw recognition from the Union. In a similar vein, there is no indication in the record that Respondent knew of the substance of the matters testified to by Staff at that time. Respondent did not rely on those matters in deciding to withdraw recognition from the Union, and apparently Respondent is relying on them solely for the purpose of attempting to prove that the Union, in fact, did not have majority status.[8] With regard to the matters set forth below, Respondent contends that it did have a reasonably based

8. As the Board held in *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Association of Pocatello, Idaho, and its Employer-Members*, 213 NLRB No. 74, an employer's reasonably based doubt of a union's majority status must be predicated on information it had at the time of its refusal to bargain. See also, *Orion Corp.*, 210 NLRB 633, enf. 515 F.2d 81 (C.A. 7, 1975).

doubt as to the Union's majority, upon which it acted in withdrawing recognition.

2. The remarks by employees of Respondent and the newspaper articles

Dale McHatton is Respondent's manager.[9] In early September 1974, McHatton overheard Dave Wilmurth, who at the time was employed by Respondent as a cook, speaking to Union Representative Hart. Wilmurth told Hart that he was making over scale without paying dues and he asked Hart what the Union could do for him. Wilmurth then said to McHatton, "if I don't have to pay any dues and I'm making over scale now, what good are they going to do, isn't that right, Dale." McHatton replied that it was Wilmurth's problem.[10] The same day, McHatton reported the incident to Respondent's Secretary-Treasurer and Comptroller Francis R. Cannon.

About the same date, McHatton overheard waitress Pat Tucker talking to another waitress. He heard Tucker say, "I'm not going to join until I find out if they can do more than what the employer is doing for me now." McHatton also reported that incident to Cannon, who replied that Tucker had made similar remarks to him. In July or August 1974, Tucker had told Cannon that she had never belonged to the Union and that she couldn't see where the Union could do anything.

During the period between July and October 1974, McHatton overheard bits and pieces of other conversations between

9. The complaint alleges, the answer admits and I find that McHatton is a supervisor within the meaning of the Act.

10. This finding has been based on the credited and uncontradicted testimony of McHatton. The Union's records show that Wilmurth applied for membership in the Union and paid initiation fees and dues on September 20, 1975. However, that fact does not refute McHatton's assertion that Wilmurth made the remarks set forth above.

employees about the status of the Union and how many people the Union had. He testified that he could recall conversations but not the people involved. He averred that they talked about the Union going broke, the Union not having enough organized people, and their feeling that the Union could not do anything for them. He reported those bits and pieces of conversations to management officials.

Howard Schlegel was swing-shift manager for Respondent from May through December 1974.[11] In mid-September 1974, he overheard a conversation between two women in a restaurant booth at the club. One of them was Evelyn Drew, one of Respondent's casino cashiers. He heard Drew say that she didn't care for union activities and she couldn't understand what they would do for her. As a casino cashier, Drew was not within the bar and culinary employees bargaining unit. Schlegel reported the incident to Cannon. Schlegel testified that he overheard other conversations by employees in September but that he didn't recall any specific statements or any particular persons.

All of the incidents that were reported to Cannon were, in turn, reported by Cannon to Respondent's General Manager Miltonberger and Respondent's President Kelley.

Cannon credibly testified that sometime after July 22, 1974, he read articles in the Reno Journal and in the Gazette which reported that the Union was reorganizing and had brought in organizers.

3. The conversations between Respondent's supervisors and the decision to withdraw recognition

Cannon, in his testimony, was very vague on dates. He averred that he had had a number of conversations with McHatton and Schlegel between the end of July and the early part of October 1974, but that he didn't remember

11. Schlegel was a supervisor within the meaning of the Act.

dates. On one occasion he asked McHatton if there had been any union activity around, and McHatton said that there had been people in there.[12] Cannon asked McHatton if McHatton heard any information from the employees about the Union. McHatton replied that there had been some discussion with people and remarks were made to the effect that they couldn't see what the Union could do for them. Cannon had a similar discussion with Schlegel.

After expressing considerable ambiguity on the dates, Cannon averred that he had a discussion with Respondent President Kelley and General Manager Miltonberger during the first part of August 1974. Kelley asked Cannon whether there ever had been any grievances filed, and Cannon replied that to his knowledge there had been none.[13] They also discussed the amount of turnover among Respondent's employees. The turnover ratio was about 4 to 1 a year, with four employees being hired for every one that remained per year.[14] Kelley asked Cannon whether Cannon thought

12. McHatton testified that he couldn't "recollect" whether he had seen Union business agents on the premises for business purposes during the 13 years he was day-shift manager before September 1974. Schlegel testified that during the time he worked on the premises between May and December 1974, he saw one union representative in September, and that was Bob Hart. Business Representative Lawrence testified that he had several conversations with Schlegel on the premises between June and September 1974, as well as two or three such conversations after September. I credit Lawrence.

13. Cannon testified that he didn't recall anything being filed showing violations, that he was not aware of any contract violations, and that it was Respondent's policy to abide by the contract.

14. Though the turnover ratio varied considerably with different groups of employees, it was approximately 4 to 1 among the culinary employees as well as the average for the employees as a whole. The turnover for cashiers was small, but for dishwashers it ran about 10 to 1, for bus personnel, 6 or 8 to 1, for porters, 8 to 1, and for cooks, 4 to 1. A compilation from Respondent's records, which was prepared shortly before trial, showed that of approximately 102 culinary employees who were on Respondent's payroll sometime in 1974, 21 had been employed at some point in 1973, and 10 had been employed at some point in 1972. Respondent's average employed complement in its peak season was about 87, and in its low season about 55, with the high in the culinary unit about 52 and the low about 35 or 40.

the Union had sufficient membership in the operation at the lake. Cannon replied that he didn't think the Union had controlling membership because of the amount of personnel turnover. He also told Kelley that he had been informed by McHatton and Schlegel that they had been told that the Union couldn't do anything for the employees. In addition, he said that the rumor was that the Union had about 800 to 1,000 members in the entire area. Cannon also told Kelley that they had never had any correspondence as far as an election was concerned.

On September 10 or 12, 1974, Cannon, Kelley and Miltonberger had another meeting. At that meeting Kelley asked Cannon whether they should withdraw from the Association. Cannon replied that management felt that the Union didn't have enough employees to win an election, and he recommended to Kelley that they withdraw recognition from the Union. He also said that the Association should be notified that they were withdrawing. He told Kelley that the rumor was that the Union was financially in trouble and that the Union was trying to organize and obtain funds from out of state in order to continue their organizing. Miltonberger said that he felt the same as Cannon, and that the Union did not represent the majority of the employees at that time.

Cannon, Miltonberger and Kelley met again on September 16, 1974. Cannon said that he didn't think that the Union represented the employees and that based on the information he had received, both directly and indirectly, they should challenge the Union as far as an election was concerned. He

said that the turnover was so great that he could not see how the employees would bring in a vote for the Union. At that meeting, the three of them made the decision that the Union's majority status should be challenged.

4. The Union's demand for negotiations and Respondent's refusal

The last contract expired by its terms on November 30, 1974. By letter dated July 22, 1974, Union International Trustee Al Bramlet notified Respondent of his desire to change and modify the contract and sought to arrange for collective-bargaining negotiations. By letter dated September 18, 1974, to the Association, Respondent resigned its membership in the Association and withdrew its authorization for the Association to represent it in connection with collective bargaining or labor relations. A copy of that letter was sent to the Union with a covering letter dated September 18, 1974, notifying the Union that the outstanding contract was terminated effective as of the term thereof. By letter dated September 27, 1974, Phillip Bowe, the Union's attorney, acknowledged Respondent's September 18, 1974, letter withdrawing from the Association and requested Respondent to contact Bramlet to discuss a convenient time for negotiations. By letter dated October 11, 1974, Respondent informed the Union that it had never dealt with either Bowe or Bramlet, that it understood that Bramlet represented a local in Las Vegas, and that it did not understand the Union's request. Bowe responded by letter dated October 15, 1974 in which he told Respondent that Bramlet had been appointed international trustee and that Tucker was Bramlet's assistant. On October 18, 1974, Bowe once again wrote to Respondent demanding that negotiations begin. By letter dated October 23, 1974, Respondent's attorney, Berke,

reminded the Union that Respondent had previously withdrawn from the multi-employer unit and notified the Union that if its demand for bargaining was a request to bargain in a single-employer unit: "then at the instructions of our client, we inform you that our client has a genuine doubt that your local represents an uncoerced majority of its employees in an appropriate unit." The letter went on to state that Respondent would fulfill whatever legal obligations it had if the Union won a Board-conducted election.

The Union filed the unfair labor practice charge on November 19, 1974, in which it alleged that Respondent unlawfully refused to recognize and bargain with it.

Respondent admits that commencing on or about October 23, 1974, it has refused and continues to refuse to bargain collectively with the Union and has withdrawn recognition from the Union.

On July 25, 1975, which was about 9 months after the refusal to bargain and about 8 months after the filing of the charge, Respondent filed a petition for an election with the Board.[15]

C. *Analysis and Conclusions*[16]

1. The presumption of majority

As the Board held in *Walter E. Heyman d/b/a Stanwood Thriftmart,* 216 NLRB No. 154:

> A contract, lawful on its face, raises a presumption that the contracting union was the majority represent-

15. That petition mistakenly shows the contract expiration date as February 15, 1975. In fact, the contract expired on November 30, 1974.

16. Much of the legal analysis set forth below is the same as that which is contained in my Decision in *Sahara-Tahoe Corporation, d/b/a Sahara Tahoe Hotel,* JD-(SF)-9-76 (issued Jan. 21, 1976), a case that involved many of the same legal principles.

ative at the time the contract was executed, during the life of the contract, and thereafter.[2]

2. *Shamrock Diary, Inc.*, 119 NLRB 998, 1002 (1957), and 124 NLRB 494, 495-496 (1959), enfd. 280 F.2d 665 (C.A.D.C.), cert. denied 364 U.S. 892 (1960).

The legality of the Union's initial recognition by Respondent is not subject to attack in this case. In *Stanwood Thriftmart,* the Board said:

> The Board has held that events time-barred by the limitations provision of Section 10(b) of the Act may not be used to overcome the presumption of majority status raised by a contract valid on its face. The contract contains a clause which recognized the Union as majority representative and a lawful union-security clause. The legality of the Union's initial recognition by Respondent was precluded by Section 10(b) of the Act from being attached [sic] at the time of Respondent's termination of the contract and withdrawal of recognition from the Union. Therefore, we find that Respondent may not defend its refusal to continue to recognize and bargain with the Union by an attack on its initial recognition of the Union. [Footnote omitted.]

In the instant case, the presumption of continued majority status is based on a contract in a multi-employer bargaining unit. The complaint alleges a refusal to bargain in a single-employer bargaining unit. A serious question is presented whether the presumption of continued majority which flowed from the existence of the multi-employer contract survived the withdrawal of Respondent from the multi-employer unit and can be applied to the newly-created single-employer unit. There has never been any contract between Respondent and the Union in the single-employer unit and, therefore, any presumption of majority must flow

from Respondent's inclusion in the multi-employer contract that expired on November 30, 1974.

In *Downtown Bakery Corp.*, 139 NLRB 1352, enf. den. in pert. part 330 F.2d 921 (C.A. 6, 1964), a successor employer refused to bargain with a union where that union was the Board-certified representative of the employees in a multi-employer bargaining unit which included a predecessor employer. In that case the predecessor employer had signed a separate collective-bargaining agreement with the union. Relying on a presumption of continued majority, the Board found that the successor employer violated Section 8(a)(5) of the Act by refusing to bargain with the union in the single-employer unit. The Sixth Circuit Court of Appeals refused to enforce the Board's bargaining order, holding in part that there was not sufficient evidence in the record to support a finding of majority status of the union.

In *The Richard W. Kaase Company,* 141 NLRB 245, enf. den. in pert. part 346 F.2d 24 (C.A. 6, 1965), a similar factual pattern was presented, and the Board followed its *Downtown Bakery Corp.* precedent. In *The Richard W. Kaase Company* case, a union was certified as the collective-bargaining agent of the employees of employers in a multi-employer bargaining unit which included a predecessor employer. That employer executed a separate collective-bargaining agreement. Thereafter, a successor employer continued to recognize the predecessor's contract but later withdrew recognition. The Board found that the successor violated Section 8(a)(5) of the Act. The Sixth Circuit Court of Appeals once again refused to enforce the Board's order, holding: "the ambiguity inherent in the multi-employer election here relied on vitiates its efficacy to prove a majority as to any single employer."

The Board law established by the *Downtown Bakery* and *Richard W. Kaase Company* cases is not directly applicable to the instant situation. In each of those cases, the individual employer had signed separate collective-bargaining contracts with the union and the presumption of continued majority could flow from those contracts rather than from the multi-employer certification. In the instant case, the initial collective-bargaining relationship was in a multi-employer bargaining unit and the contracts to which Respondent was a party were multi-employer bargaining contracts.[17] However, I believe that the presumption of continued majority flowing from the multi-employer contracts requires a derivative presumption of the Union's majority status which is applicable to each of the employer-members of the multi-employer bargaining unit separately. Unless a majority of an employer's employees desire representation by a union, that employer may not lawfully force representation on them by joining a multi-employer bargaining arrangement. *Mohawk Business Machines Corporation,* 116 NLRB 248; *Dancker & Sellew, Inc.,* 140 NLRB 824, enf. 330 F.2d 46 (C.A. 2, 1964). Thus, Respondent would have violated the Act in 1962 when it became party to the multi-employer collective-bargaining agreement if a majority of its employees did not desire representation. Any unfair labor practice charge relating to such a violation would have had to have been filed within 6 months from that time. Respondent may not now either attack the initial bargaining relation or use it to establish a defense to a refusal to bargain complaint. As the Board held in *North Bros. Ford, Inc.,* 220 NLRB No. 154:[18]

17. It is also noted that, unlike the instant situation, both those cases involved conflicting representational claims by rival unions.

18. See also *Walter E. Heyman d/b/a Stanwood Thriftmart, supra.*

Section 10(b) of the Act confines the issuance of unfair labor practice complaints to events occurring during the 6 months immediately preceding the filing of a charge and has been interpreted by the Supreme Court to bar finding any unfair labor practice, even though committed within that period, which turns on whether or not events outside that period violated the Act. *Bryan Manufacturing Co.*[3] The Court, holding that maintenance and enforcement of a contract more than 6 months after recognition of a minority union did not violate the Act, relied in part on the legislative history indicating that Congress specifically intended Section 10(b) to apply to agreements with minority unions in order to stabilize bargaining relations. Noting that labor legislation traditionally entails compromise, the Court observed

> that the interest in employee freedom of choice is one of those given large recognition by the Act as amended. But neither can one disregard the interest in "industrial peace which it is the overall purpose of the Act to secure."[4]

The Board, in light of *Bryan,* has since held that Section 10(b) is applicable to a refusal-to-bargain defense that the bargaining relation was unlawfully established.[5]

3. *Local Lodge No. 1424, IAM, AFL-CIO* [*Bryan Manufacturing Co.*] *v. N.L.R.B.,* 362 U.S. 411 (1960).

4. Id. at 428, citations omitted.

5. *Barrington Plaza and Tragniew, Inc.,* 185 NLRB 962 (1970), enforcement denied on other grounds *sub nom, Tragniew, Inc., and Consolidated Hotels of California v. N.L.R.B.,* 470 F.2d 669 (C.A. 9, 1972); *Roman Stone Construction Company, and Kindred Concrete Products, Inc.,* 153 NLRB 659, fn. 3 (1965).

Respondent may not, at this late date, attack either the initial recognition of the Union by Respondent or the initial contract. It cannot defend against the refusal to bargain complaint on the ground that the original contract was entered into at a time when the Union did not represent a majority of the employees of Respondent. Nor can it defend on the ground that the Union did not represent a majority of the employees in the overall multi-employer bargaining unit. That contract must be considered valid on both those grounds. The presumption of majority status which continued over the years based on successive contracts applies both as to the employees of Respondent and to the employees in the multi-employer unit. I therefore find that the General Counsel has properly relied on that presumption to establish the Union's majority in the unit in question. It remains to be considered whether Respondent has successfully rebutted that presumption.

2. The attempt to rebut the presumption

a. *The background law*

In *James W. Whitfield d/b/a Cutten Supermarket,* 220 NLRB No. 64, the Board summarized the existing law, holding:

> It is well settled that Section 8(a)(5) and Section 8(d) of the Act require an employer to recognize and bargain in good faith with the bargaining representative selected by a majority of its employees. That recognition establishes a presumption of majority status which, in circumstances such as this, may be rebutted.[6] The employer may lawfuly refuse to bargain with the union if it rebuts the presumption by affirmatively establishing that the union has in fact lost its majority status, or shows that it has sufficient objective bases for reasonably doubting the union's continued

> majority status.[7] To establish sufficient objective bases, however, requires more than the mere assertion thereof based upon the employer's subjective frame of mind.[8] Furthermore, the employer must not have engaged in any conduct tending to encourage employee disaffection from the union.[9]

---

6. Cf. *N.L.R.B. v. Frick Company,* 423 F.2d 1327 (C.A. 3, 1970); *Keller Plastics Eastern, Inc.,* 157 NLRB 583 (1966).
7. *Celanese Corporation of America,* 95 NLRB 664, 672 (1951); *Peoples Gas System, Inc.,* 214 NLRB No. 141 (1974).
8. *Laystrom Manufacturing Co.,* 151 NLRB 1482 (1965), enforcement denied 359 F.2d 799 (C.A. 7, 1966); *Automated Business Systems, Inc., a Division of Litton Business Systems, Inc.,* 205 NLRB 532 (1973), enf. denied 497 F.2d 262 (C.A. 6, 1974).
9. *Peoples Gas System, Inc., supra.*

In *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Association of Pocatello, Idaho and its Employer-Members,* 213 NLRB No. 74, the Board held that these principles are equally applicable whether the union was certified by the Board or was recognized without Board certification. In that case, the Board held that the existence of a prior contract, lawful on its face, raised a presumption that the union was the majority representative at the time the contract was executed and also raised the presumption that the union's majority continued at least through the life of the contract. The Board held that "Following the expiration of the contract . . . the presumption continues and, though rebuttable, the burden of rebutting it rests on the party who would do so . . . ."

The complaint does not allege that Respondent engaged in any unfair labor practice other than the refusal to bargain. There is no contention that Respondent engaged in any other conduct tending to encourage employee disaffection from the Union.

b. *The alleged actual loss of majority*

For the reasons set forth above, the presumption of continued majority which flowed from the contract, survived the change in the bargaining unit and applied to the single employer unit. It follows that the change in the unit is not in itself proof that the Union no longer represented a majority of Respondent's employees.

In June 1974 the Union had about $11,000 in its treasury and that amount was decreasing. However, the Union's liabilities did not exceed its assets, and even if they did the Union's financial condition would not indicate how many employees the Union actually represented.

About that time the Union had approximately 1,000 members, of whom between 700 and 800 were paid up in their dues. Those are industry-wide figures and there is no way to tell from them how many of Respondent's employees were union members. Even if Respondent had established that a majority of its employees were not members of the Union, such a showing would not be the equivalent of establishing a lack of desire of those employees for union representation. Employees may desire representation without wanting to join a union or pay dues. *Orion Corp.*, 210 NLRB 633, enf. 515 F.2d 81 (C.A. 7, 1975). As the Board stated in *Wald Transfer & Storage Co.*, 218 NLRB No. 73:

> It has been clearly established that a distinction exists between union membership and union support, foreclosing relying upon one as evidence of the other. Here, union membership being voluntary in this right-to-work State emphasizes that distinction. Many employees while approving of the Union may not choose to give it their financial support *or* participate as members.[3]

3. See *Terrell Machine Company*, 173 NLRB 1480 (1969), enfd. 427 F.2d 1088 (C.A. 4, 1970), cert. denied 398 U.S. 929; *N.L.R.B. v. Gulfmont Hotel Company*, 362 F.2d 588, 592 (C.A. 5, 1966).

The Union sought funds from the International to organize employees in the industry and to build up its membership so that it would have strength in negotiating the next contract. The Union also accepted International trusteeship. Those facts, however, do not indicate whether or not Respondent represented a majority of Respondent's employees. The Union wanted to obtain more members in the industry and it engaged in some internal revisions, but it would be sheer speculation to make an evaluation based on those facts as to the number of Respondent's employees the Union actually represented.

Some of the bartenders at the Overland Hotel in Reno told Staff, in substance, that they were dissatisfied with the Union. There is no evidence in the record that any of the employees of Respondent ever expresed dissatisfaction with the Union to Staff.

There is nothing in the LM-2 forms filed by the Union that can be read to indicate that a majority of Respondent's employees did not want representation by the Union.

The above matters in themselves and when considered in connection with the matters set forth below relating to Respondent's claimed reasonable doubt as to the Union's majority, fall short of establishing that the Union in fact did not represent a majority of Respondent's employees.

C. *The alleged reasonably based doubt of the Union's majority status*

Respondent made its decision to question the Union's majority status on September 16, 1974. That decision was made while Respondent was still part of the multi-employer bargaining unit and still bound by the multi-employer contract. At the same time that it decided to question the Union's majority, Respondent also decided to withdraw

from the Association. The withdrawal from the Association took place 2 days later on September 18, 1974, and both Respondent and the Union were notified. However, Respondent did not notify the Union that it questioned the Union's majority status until October 23, 1974. Respondent did not file a petition for an election until July 25, 1975.

The Board has long held that questions relating to an employer's reasonably based doubt as to a union's continued majority cannot be resolved by the application of any mechanical formulas and can only be answered "in the light of the totality of all circumstances involved in a particular case." *Celanese Corporation of America,* 95 NLRB 664. In the instant case Respondent has raised a number of matters on which it claims to have based a reasonable doubt as to the Union's majority. These matters must be considered in the context of the major disruption in the bargaining unit which occurred when Respondent withdrew from the Association and the filing by Respondent of a petition for an election. Also to be considered, however, is the fact that Respondent made the decision to question the Union's majority before it withdrew from the multi-employer bargaining unit and the fact that Respondent did not see fit to file a petition for an election until some 10 months after it decided to question the Union's majority.

At a meeting during the first part of August 1974, Respondent's Secretary-Treasurer and Comptroller Cannon told General Manager Miltonberger and President Kelley that the rumor was that the Union had about 800 to 1,000 members in the entire area. Membership in the Union is one factor to be considered. *People's Gas System, Inc.,* 214 NLRB No. 141; *Convair Division of General Dynamics,* 169 NLRB 131. However, Cannon's remarks were not only based on rumor but were keyed to union membership in the

industry as a whole rather than to membership among Respondent's employees. In addition, as is set forth in more detail above, a lack of employee membership cannot be equated to a lack of desire of employees for union representation. *Orion Corp., supra; Wald Transfer & Storage Co., supra.*

Sometime after July 22, 1974, Cannon read articles in local newspapers which reported that the Union was reorganized and had brought in organizers. Cannon's testimony with regard to those newspaper articles gives little support for his contention that he reasonably doubted the Union's majority status.

At a meeting on September 10 or 12, 1974, Cannon reported to the other Company officials that the rumor was that the Union was financially in trouble, and that the Union was trying to organize and obtain funds from out of state. Rumors are not objective criteria. In any event a union may have financial difficulties whether or not it represents a majority, and organizational activity only indicates that a union desires more members than it has.

At the meeting in the first part of August 1974, Cannon told the other officials of Respondent that, to his knowledge, no grievances had ever been filed by the Union.[19] A union's lack of activity is one factor that must be evaluated in determining whether a company has a reasonably based doubt of a union's majority. *Taft Broadcasting,* 201 NLRB 801. However, in the instant case there is no showing that the filing of grievances was warranted, and there is no showing that the Union failed to actively represent the employees in the past. Cannon testified that sometime be-

19. Cannon also said that there never had been any correspondence as far as an election was concerned. As is set forth above, the presumption of majority can be based on either certification or voluntary recognition.

tween the end of July and early October 1974, he asked Supervisors McHatton and Schlegel if there had been any union activity around and McHatton told him there had been people in there. Apart from that testimony and Cannon's assertion that no grievances had been filed, there is no evidence that Cannon believed that the Union had been inactive in the past or that the Union's activity during the summer of 1974 was substantially different than it had been before.[20]

In the first part of August 1974, Cannon spoke to Kelley and Miltonberger about the turnover rate of its employees. The rate was about 4 to 1 a year, with four employees being hired for every one that remained per year. Cannon said that he didn't think the Union had a controlling membership because of the amount of personnel turnover. At the meeting of September 16, 1974, at which the decision to question the Union's majority was made, Cannon told the other officials of Respondent that the turnover was so great that he could not see how the employees would bring in a vote for the Union. High turnover is one circumstance among others that must be considered. *People's Gas System, Inc., supra; Convair Division of General Dynamics, supra; Kentucky News, Inc.,* 165 NLRB 777. However, high employee turnover in itself is insufficient to establish a reasonable doubt as to a union's majority, and the Board has repeatedly held that new employees will be presumed to support the Union in the same ratio as those they may replace. *Strange and Lindsey, Inc.,* 219 NLRB No. 190;

20. McHatton testified that he couldn't "recollect" whether he had seen Union business agents on the premises for business purposes before September 1974. Schlegel testified that when he worked at Respondent's premises between May and December 1974, he saw one union representative in September. That testimony does not establish a lack of union activity. In addition, there is no evidence that those supervisors communicated such information to Cannon.

King Radio Corporation, 208 NLRB 578, enf. 510 F.2d 1154 (C.A. 10, 1975).

Cannon knew that some of the employees were dissatisfied with the Union. Waitress Tucker told Cannon that she had never belonged to the Union and that she couldn't see where the Union could do anything. Tucker made a similar remark to McHatton which was passed on to Cannon. McHatton also passed on to Cannon the remark by employee Wilmurth that Wilmurth didn't see what good the Union was going to do.[21] In addition, McHatton told mangement officials about bits and pieces of conversations he heard from other employees, the names of whom he could not recall, concerning the Union going broke, the Union not having enough organized people and their feeling that the Union could not do anything for them. Schlegel told Cannon that he overheard casino cashier Drew say that she didn't care for union activities and she couldn't understand what the Union could do for her. Drew was not within the bar and culinary employees bargaining unit. Respondent's evidence thus establishes that Cannon had reason to believe that three named employees, one of whom was not a member of the bargaining unit in question, had expressed disapproval of the Union. In addition, he was informed that bits and pieces of overheard conversations by an undisclosed number of other employees, also indicated dissatisfaction. There were between 35 and 52 employees in the bar and culinary employees unit. The evidence adduced by Respondent falls far short of establishing that a majority of the employees in the bargaining unit expressed displeasure with the Union. The number of employees who expressed displeasure with the Union was insubstantial with relation to the overall

21. It is noted that Wilmurth applied for membership in the Union and paid his initiation fees and dues.

employee complement in the unit and Respondent could not base a reasonable doubt of majority on such a limited number of remarks. Cf. *Strange and Lindsey Beverages, Inc., supra.*

In *United Supermarkets, Inc.*, 214 NLRB No. 142, the Board held that an employer did not have a reasonable doubt based on objective facts as to the Union's continuing majority status. The Board held:

> A showing of such doubt requires more than an employer's mere assertion of it, and more than proof of the employer's subjective frame of mind. The assertion must be supported by objective considerations, that is, some substantial and reasonable grounds for believing the Union has lost its majority status. [Footnotes omitted.]

After considering all of the factors set forth above, I conclude that Respondent did not have substantial and reasonable grounds for believing the Union had lost its majority status. Respondent's assertion in that regard was based on subjective rather than objective considerations.[22] In sum, I find that the presumption of continued majority has not been rebutted either by a showing that the Union in fact lost its majority status or by a showing that Respondent had a sufficient objective basis for reasonably doubting the Union's continued majority. I find that Respondent violated Section 8(a)(5) and (1) of the Act as alleged in the complaint.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent, set forth in Section III, above, occurring in connection with the operations of Respondent described in Section I above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

22. Cannon's remark that turnover was so great that he could not see how the employees would bring in a vote for the Union was merely one example of Respondent's subjective approach.

V. The Remedy

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent violated Sections 8(a)(5) and (1) of the Act by unlawfully withdrawing recognition from the Union and by refusing to bargain with the Union as the exclusive representative of its employees in the aforesaid appropriate unit, I recommend that Respondent be ordered to recognize and, upon request, to bargain in good faith with the Union as the exclusive representative of its employees in that unit.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and it will effectuate the policies of the Act for the Board to assert jurisdiction.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees employed by the Respondent in its bar and culinary operations at its Crystal Bay, Nevada, operations, excluding all other employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein, the Union has been the exclusive bargaining representative of the employees in the aforesaid appropriate unit within the meaning of Section 9(a) of the Act.

5. By withdrawing recognition from the Union and by refusing to bargain with the Union, Respondent has engaged in unfair labor practices within with meaning of Section 8(a)(5) of the Act.

6. By the foregoing conduct, Respondent has interfered with, restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act, thereby engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[23]

ORDER

Respondent, Tahoe Nuggett, Inc. d/b/a Jim Kelley's Tahoe Nugget, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain in good faith with Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders

23. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided, in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

International Union, AFL-CIO, as the exclusive representative of its employees in the following bargaining unit:

> All employees employed by it in its bar and culinary operations at its Crystal Bay, Nevada, operations, excluding all other employees, guards and supervisors as defined in the Act.

(b) In any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Recognize and, upon request, bargain in good faith with Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, as the exclusive representative of its employees in the unit described above.

(b) Post at its Crystal Bay, Nevada, facility copies of the attached notice marked, "Appendix."[24] Copies of the notice on forms provided by the Regional Director for Region 20, after being duly signed by its authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 (sixty) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced or covered by any other material.

(c) Notify the Regional Director for Region 20, in writ-

24. In the event the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD," shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

ing, within 20 (twenty) days from the date of this Order what steps it has taken to comply herewith.

Dated: January 28, 1976.

Richard D. Taplitz
Administrative Law Judge

Appendix

Form NLRB-4727
(9-69)

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

We hereby notify you that:

WE WILL NOT refuse to recognize and bargain in good faith with Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, as the exclusive representative of our employees in the following bargaining unit:

> All employees employed by us in our bar and culinary operations at our Crystal Bay, Nevada, operations, excluding all other employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of their rights guaranteed by Section 7 of the Act.

WE WILL recognize and, upon request, bargain in good faith with said Union as the exclusive representative of our employees in that unit.

Tahoe Nuggett, Inc. d/b/a
Jim Kelley's Tahoe Nugget
(Employer)

Dated ..... By .....
(Representative) (Title)

This Is an Official Notice and Must Not Be Defaced by Anyone

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 13018 Federal Building Box 36047, 450 Golden Gate Avenue, San Francisco, California, 94102. Telephone Number: (415) 556-6721.

Appendix D(1)

227 NLRB No. 73

MJW
D—1504
Crystal Bay, Nev.

United States of America
Before the National Labor Relations Board

Nevada Lodge
and
Hotel-Motel-Restaurant
Employees & Bartenders Union, Local 86,
Hotel & Restaurant Employees & Bartenders
International Union, AFL-CIO
Received Dec 20 1976
Severson, Werson, Berke & Melchior

Cases 20—CA—9648 and
20—CA—9847

DECISION AND ORDER

On March 8, 1976, Administrative Law Judge Richard D. Taplitz issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief. General Counsel and the Charging Party filed briefs in support of the Decision.

The Board has considered the record and the attached Decision in light of the exceptions and briefs[1] and has decided to affirm the rulings, findings,[2] and conclusions[3] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board

adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Nevada Lodge, Crystal Bay, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. December 16, 1976

Betty Southard Murphy, Chairman
Howard Jenkins, Jr., Member
National Labor Relations Board

(Seal)

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1. Respondent's request for oral argument is hereby denied, as the record and the briefs adequately present the issues and the positions of the parties.

Respondent has moved to strike the Charging Party's brief on the ground that the brief makes certain assertions which are misleading and unfounded in fact. We consider Respondent's motion to be without merit and hereby deny it.

2. The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

3. For the reasons enunciated in our decision in *Tahoe Nugget, Inc.*, 227 NLRB No. 72 (1976) we agree with the Administrative Law Judge that the presumption of majority status flowing from the contract in the multiemployer unit survives Respondent's timely withdrawal from that unit and carries over to the newly created single-employer unit.

Respondent has excepted to the Board's asserting jurisdiction in this proceeding. It argues that the Board's assertion of jurisdiction over the gaming industry is arbitrary and capricious when compared to the Board's refusal to assert jurisdiction over the horseracing and dogracing industries. The Board has in previous cases considered and rejected arguments identical to those now raised by Respondent. *El Dorado Inc. d/b/a El Dorado Club*, 151 NLRB 579 (1965); *The Anthony Company d/b/a El Dorado Club*, 220 NLRB No. 152 (1975). We adhere to our approach in those cases and accordingly affirm the Administrative Law Judge's decision asserting jurisdiction over Respondent.

Member Walther, dissenting:

For the reasons enunciated by me in my dissenting opinion in *Tahoe Nugget, Inc.*, 225 NLRB No. 112 [sic], I dissent from my colleague's conclusion that the presumption of majority status flowing from the contract in the multiemployer unit survives Respondent's timely withdrawal from that unit and carries over to the newly created single-employer unit. Accordingly, in the absence of proof of majority standing, I would dismiss the complaint.

Dated, Washington, D.C. December 16, 1976

Peter D. Walther, Member
National Labor Relations Board

Appendix D(2)

JD-(SF)-56-76
Crystal Bay, Nev.

United States of America
Before the National Labor Relations Board
Division of Judges
Branch Office
San Francisco, California

Cases Nos. 20-CA-9648
20-CA-9847

Nevada Lodge
and
Hotel-Motel-Restaurant Employees &
Bartenders Union, Local 86,
Hotel & Restaurant Employees & Bartenders
International Union, AFL-CIO

Stuart R. Dvorin and *Eileen H. Hamamura, Attys.*,
of San Francisco, Calif., for the General Counsel.
Severson, Werson, Berke & Melchior
by *William W. Wertz, Atty.*, of San Francisco, Calif.,
for Respondent.
Davis, Cowell & Bowe by *Richard G. McCracken, Atty.*,
of San Francisco, Calif., for the Charging Party.

DECISION

Statement of the Case

Richard D. Taplitz, Administrative Law Judge: This case was tried in South Lake Tahoe, California, on October 21 and 22, 1975. The charge, and the first, second, third, fourth and fifth amended charges in Case No. 20-CA-9648 were filed on October 16, November 13 and 18, December 26,

1974, February 27 and June 2, 1975, respectively, by Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, herein called the Union. The charge in Case No. 20-CA-9847 was filed by the Union on January 9, 1975. The complaint, which issued on August 13, 1975 and was amended at the hearing, alleges that Nevada Lodge, herein called Respondent, violated Sections 8(a)(1) and (5) of the National Labor Relations Act, as amended.

Issues

The primary issues are:

1. Whether Respondent violated Section 8(a)(1) of the Act by announcing and granting increases in pay and employee benefits in order to induce employees to abandon their support for the Union.

2. Whether Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from and refusing to bargain with the Union as the collective-bargaining representative of its bar and culinary employees. Subsidiary issues with regard to that allegation are:

(a) Whether the rebuttable presumption of the Union's continued majority status which flowed from a contract in a multiemployer bargaining unit survived Respondent's timely withdrawal from that unit and was applicable to a single-employer bargaining unit.

(b) If the presumption did apply, whether Respondent has rebutted that presumption by affirmatively establishing that the Union had, in fact, lost its majority or by showing that Respondent had sufficient objective bases for reasonably doubting the Union's continued majority.

A further issue is whether the Respondent has engaged in any conduct tending to encourage employee disaffection from the Union.

3. Whether Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally instituting a dental insurance plan without prior notification to or consultation with the Union.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel, Respondent and the Charging Party.

Upon the entire record of the case and my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. The Business of Respondent

Respondent is a corporation engaged in the operation of a restaurant, hotel and gaming casino at Crystal Bay, Nevada. During the past calendar year Respondent's gross revenues were in excess of $500,000, and during that year Respondent purchased and received goods valued in excess of $10,000 which originated outside of Nevada.

Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act, and it will effectuate the policies of the Act for the Board to assert jurisdiction. See *The Anthony Company d/b/a El Dorado Club,* 220 NLRB No. 152 and cases cited therein.

II. The Labor Organization Involved

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *The Background*

The Reno Employers Council, herein called the Association, is a Nevada corporation with an office in Reno,

Nevada. It is a voluntary association of employers engaged in the casino, restaurant and other industries. The Association exists, in part, for the purpose of representing its member-employers in collective bargaining and in administering collective-bargaining agreements with various labor organzations, including the Union. The Union and the Association entered into a multiemployer collective-bargaining contract on August 3, 1959. The Association agreed to the contract on behalf of employers it represented in the Lake Tahoe area.[1] Succeeding contracts followed,[2] with the last effective from December 1, 1971 through November 30, 1974.[3] That contract was between the Union and the Association on behalf of the individual members thereof signatory thereto. Five employers were signatory to the contract, including Respondent.[4] The employees covered by that contract were those in the employers' bar and culinary operations at Lake Tahoe.

Respondent purchased its facility, which had formerly been operated as the Tahoe Biltmore, in November 1957. The establishment was then closed for substantial reconstruction. It opened in July 1958 with all new employees.

The Tahoe Biltmore had a single-employer collective-bargaining agreement with the Union that was effective by its terms until September 4, 1957. That contract covered

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1. Local 45, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO was also party to that contract. Subsequently, Local 45 merged into Local 86, the Union herein.

2. In some of those contracts new member-employers of the Association were added and other employers were deleted.

3. Nevada is a right-to-work state and none of the contracts contained a union-security clause.

4. The signatory employers were Barney's Club, Harvey's Resort Hotel, Respondent, Sahara-Tahoe and Tahoe Nugget.

employees of the Tahoe Biltmore who came under the jurisdiction of the Union. The complaint does not allege nor did the General Counsel prove that Respondent is a successor-employer who would be bound by the Tahoe Biltmore's collective-bargaining relationship with the Union. However, Respondent joined the Association and became a party to the multiemployer bargaining agreement that was executed on December 4, 1960.[5] Respondent continued to be a party to the successive contracts through the one that expired on November 30, 1974.

On September 17, 1974, Respondent timely withdrew its membership from the Association.[6] On October 25, 1974, Respondent refused to bargain with the Union, and Respondent has withdrawn recognition from the Union. On July 25, 1975, Respondent filed a petition for an election with the Board. That petition sought an election among Respondent's culinary and bartender employees in a single-employer unit. The complaint alleges a refusal to bargain in that single-employer unit. The complaint alleges, the answer admits, and I find that the appropriate bargaining unit is:

> All employees employed by the Respondent in its bar and culinary operations at its Crystal Bay, Nevada operations, excluding all other employees, guards and supervisors as defined in the Act.

In September 1974 Respondent announced and granted across-the-board wage increases for its cooks, waitresses

5. Respondent's General Manager Carlton Konarske testified that to his knowledge there was no contract when Respondent opened in 1958. He also testified that shortly after the opening Respondent agreed to recognize the Union, but that he did not know whether that was before or after Respondent joined the Association.

6. The General Counsel concedes in its complaint that the withdrawal was timely.

and busboys, all of whom were employed in the bargaining unit. The wage increases were announced and granted without prior notification to or consultation with the Union. Respondent contends that the increases were lawful pursuant to the then outstanding collective-bargaining contract which stated in part:

> *Article I, Section 6. Employer May Increase Benefits, Privileges and Wages Without Prejudice.*
>
> The employer is granted the right to increase any privileges, benefits or wages provided for by this Agreement. In the event the Employer does increase any such benefits, wages or privileges he may, without prejudice, reduce said benefits, wages or privileges at any time he may choose to do so, provided that, under no circumstances, will any employee covered thereunder be paid, or given less than the minimum benefits, wages and privileges provided for herein.

The complaint does not allege nor does the General Counsel contend that the increase in wages violated Section 8(a)(5) of the Act. It is contended, however, that the increase was unlawful in that it was announced and granted in order to induce employees to abandon their support for the Union. After the Respondent withdrew recognition from the Union and after the contract expired, Respondent announced and granted a number of employee benefits, which are set forth in detail below. The General Counsel contends that all of those benefits were intended to undermine the Union in violation of Section 8(a)(1) of the Act. Also, after the expiration of the contract, Respondent instituted a dental insurance plan without notification to or consultation with the Union. The General Counsel alleges that that action violated Section 8(a)(5) of the Act.

B. *The Refusal to Bargain*

1. The facts

a. *The testimony of Staff*

Alfred E. Staff is the bar manager for the Overland Hotel in Reno. From early July 1973 to June 7, 1974, when the Union was placed under trusteeship, Staff was president of the Union.[7] During that time Staff, in addition to being union president, was a full-time bartender. The only full-time paid union officer was Secretary-Treasurer and Business Manager E. W. Tucker. Staff testified that a number of events occurred during the summer of 1974. However, it is apparent that those events took place before the trusteeship and the sequence of events set forth below is keyed to the June 7 trusteeship date. Otherwise, the following findings are based on Staff's credited testimony.

In June 1974, the Union had about $11,000 in its treasury and that amount was decreasing. However, the Union's liabilities did not exceed its assets. The Union had approximately 1,000 members, of whom between 700 and 800 were paid up in their dues.[8] In the spring of 1974, the Union sent Business Manager Tucker to the headquarters of the International in Cincinnati to see if he could obtain money to help the Union organize. The executive committee of the Union had discussed the need to obtain more members and to build the membership up to a point where the Union could have some strength when it met with the employers to negotiate the next contract. Tucker went to Cincinnati and discussed the matter with representatives of the International. He then returned and reported to the executive committee that the International would give the Union money to organize if the officers resigned, the Union went into trusteeship, and the International administered the Union. The executive committee decided to let the International take over. The matter was brought up at the next regular meeting of the Union, and a majority of the membership voted to accept the trusteeship. The officers resigned and the trusteeship was imposed on June 7, 1974. Al Bramlet was appointed International trustee.

During the summer of 1974, Tucker told Staff that there were about 30,000 employees in the Lake Tahoe and Reno areas who were employed in categories over which the Union had jurisdiction.

Conversations with Tucker and Staff's review of membership records led Staff to believe that of the approximately 900 or 1,000 union members in May 1974, about 20 percent of them were in the Lake Tahoe area and the balance were in Reno. Staff appeared confused in his testimony with regard to the distinction between union members and employees represented by the Union. His testimony read as a whole clearly indicates that when he was referring to the approximately 900 or 1,000 employees and to the 20 percent figure, he was referring to members and not to all employees who were represented through coverage by outstanding contracts.

In the spring of 1974, the Union placed announcements in local newspapers stating that the Union would hold a meeting to discuss with employees what it would ask in contract negotiations and to see if it could get more people interested in an expansion of the Union. The employees

7. Staff was unsure on his dates. He averred that he believed the trusteeship was imposed in August, but that it might have been in June. Howard Lawrence, a business representative who is the chief executive officer of the Union in the Lake Tahoe area, testified that the trusteeship was imposed on June 7, 1974. I credit Lawrence.

8. At another point in his testimony, Staff averred that there were about 700 to 750 paid up members and in addition there were about 150 other people who were on the membership rolls who were not paid up, but who were not suspended. The highest number of members during Staff's term of office was about 1200.

invited were those in the Lake Tahoe area. No employees showed up for the scheduled meeting and it was not held.

During the time that he was president, Staff spoke to some union bartenders that he worked with at the Overland Hotel in Reno and he received comments from them to the effect that they were discouraged with the Union, that the Union didn't do anything for them, and that they did not like the way the Union was being run. Some bartenders said: "When is the Union going to be able to do anything for us," "They never do nothing for us," "What's the sense of joining a Union." He never received any compliments on the performance of the Union. In addition to talking to bartenders at the Overland Hotel, he spoke to some culinary workers at various clubs in the Reno area in an attempt to organize them. However, there is no evidence in the record that any employee of Respondent expressed dissatisfaction with the Union to Staff.

Staff did not communicate any of the matters related above to Respondent and there is no indication in the record that Respondent knew of the substance of those matters at the time that it refused to bargain with the Union.

Apparently Respondent is relying on Staff's testimony solely for the purpose of attempting to prove that the Union, in fact, did not have majority status.[9] With regard to the matters set forth below, Respondent contends that it did have a reasonably based doubt as to the Union's majority, upon which it acted in withdrawing recognition.

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9. As the Board held in *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Association of Pocatello, Idaho, and its Employer-Members*, 213 NLRB No. 74, an employer's reasonably based doubt of a union's majority status must be predicated on information it had at the time of its refusal to bargain. See, also, *Orion Corp.*, 210 NLRB 633, enfd. 515 F.2d 81 (C.A. 7, 1975).

b. *Remarks by employees of Respondent, conversations between supervisors, and the newspaper articles*

In early September 1974, when Respondent was reviewing its turnover rates with a view toward questioning the Union's majority status, Respondent employed 165 or more[10] employees in the bar and culinary unit. The decision to question the Union's majority status was made by Respondent's General Manager Carlton K. Konarske. Konarske received certain direct and indirect reports concerning the attitude of some of the employees in that unit toward the Union.

In early August 1974, waitress Leona Gau told Konarske that she had no interest in the Union and that most of the girls were not interested in belonging to the Union. In a second conversation a short time later, Gau told Konarske that there was going to be a union meeting and that, though she was not interested in going, she was curious. Within the next week or two, Konarske saw three or four employees wearing union pins. About that time Gau told Konarske that she objected to the Union's forcing the pins on employees and that she objected to the Union's trying to induce busboys to join the Union because the busboys were going to college and wouldn't be there very long. She also told Konarske that she had no intention of supporting the Union.[11]

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10. At one point in his testimony Konarske testified that there were about 165 culinary workers and 26 or 27 cocktail waitresses, barboys or bartenders. Later he indicated that there were about 165 employees in the entire unit.

11. These findings are based on the uncontradicted testimony of Konarske. Union records show that Gau joined the Union on September 9, 1974, and paid her dues for October. They also show that she paid $3.50 on September 14, 1974, for a union pin. However, those facts do not warrant the discrediting of Konarske. Gau did not testify and it may well be that Gau told Konarske what she thought Konarske wanted to hear even though she was in favor of the Union.

In late August or early September, pantryman Louis Ronzo told Konarske that the Company should not be concerned about the Union because the Union got little support from the cooks. He also told Konarske that he (Ronzo) had no respect for the Union, that the Union didn't do the cooks any good, and that they were satisfied and pleased with working conditions as established by management.[12]

In August 1974, cocktail waitress Ellen Dungan told Konarske that he did not have to worry about the cocktail waitresses and busboys because, with one exception, none of them were concerned about the Union. She said that they didn't feel that the Union was necessary for their welfare and that she did not want to pay dues to the Union.

Konarske testified that in late August 1974 he spoke to bartender Max DeCaminada, who told him that he was not interested in the Union and was not going to join. At the time of the trial DeCaminada was still working for Respondent. DeCaminada paid a reinstatement fee of $35 to the Union on June 27, 1974, and continued to pay his dues through January 1975. DeCaminada testified that he had no conversation with Konarske concerning the Union in 1974. DeCaminada, while he was testifying, impressed me as a fully credible witness. His testimony was consistent with the fact that he was a dues paying member of the Union. As between Konarske and DeCaminada I credit DeCaminada.

On September 21, 1974, Konarske received a report that a union representative was in the kitchen. He went to the

12. These findings are based on the credited testimony of Konarske. Union records establish that Ronzo was a union member and paid his dues from 1970 until he died in October 1974. While the matters in those records shed some doub on Konarske's credibility, once again this may be a situation where an employee was attempting to curry favor with his employer.

kitchen and asked Union Representative Bob Hart what he was doing there. Hart replied that he had been speaking to baker William Schu. Konarske told Hart that Hart was not allowed in that area without permission and Hart left. Konarske then spoke to Schu in the presence of another baker, Paul Harbaugh. Schu told Konarske that the Union had no right to come back there and that he wished the Company would keep "these pests" out of there. Schu also said that he was not interested in the Union and he was getting fed up with them. Harbaugh said that he was satisfied with every condition there and he did not want the Union back there bothering his department. Harbaugh also said that there was no advantage to belonging to the Union.[13]

Near the end of September 1974, cook Jim Curreo told Konarske that the Company did not have to worry about the cooks supporting the Union and that almost everybody was against the Union. He also told Konarske that they were satisfied with management's working conditions.

In addition to receiving reports from the employees mentioned above, Konarske had conversations with two supervisors concerning the Union. They were Bar Manager Dutch Connor and Hotel and Food Manager Ross Henderson.[14]

13. These findings are based on the credited uncontradicted testimony of Konarske. Neither Schu nor Harbaugh testified. Union records show that Harbaugh joined the Union on June 26, 1974, and paid his dues for July through October 1974. He was suspended in December 1974. For the reasons set forth above, I do not believe that the matters set forth in the union records warrant the discrediting of Konarske.

14. At all times material herein Henderson was hotel manager. Henderson testified that he was given the additional title of food manager in September 1974. Konarske testified that the additional title was given October 1, 1974.

In August 1974, Konarske asked Connor what the status was of the employees under his jurisdiction at the bar. Connor replied that there was no problem among the cocktail waitresses or busboys, but that he was uncertain whether or not the bartenders would support the Union.

In mid-September 1974, Konarske asked Henderson whether Henderson knew about the Union and the help downstairs. Henderson replied that he didn't think they had a thing to worry about and that the girls were not supporting the Union at all. Henderson reported to Konarske a conversation that he (Henderson) had with Executive Chef Dave Rightman[15] in which Rightman said that there would be no problem with the Union with relation to the girls and busboys and that there would be no support for the Union from them.[16] Henderson had several conversations with Konarske in which he (Henderson) said that it was his opinion that the Union lacked support in the culinary workers unit and that there was a lack of interest in the Union.

In early July 1974, Konarske read an article in the Nevada State Journal or the Reno Gazette which indicated that the Union was having financial difficulties, that it was undergoing a trusteeship and that Al Bramlet was being put in charge. Sometime in the summer of 1974, he read another article in a Reno paper concerning the Union reorganizing. In July 1974, he heard a report on the radio

15. Rightman had authority to hire and fire employees and he was a supervisor within the meaning of the Act.

16. These findings are based on the credited testimony of Konarske. Henderson credibly testified that Rightman told him that there was very little interest shown in union activity and that a flyer had come around advertising a union meeting, which had ended up in the wastebasket. Henderson did not mention the flyer to Konarske. Rightman has nothing to do with the bar and he was speaking to Henderson only about coffeeshop employees.

to the effect that the Union was having financial difficulties, that it was going to be placed into trusteeship by the International and that Al Bramlet was going to be the trustee.[17]

c. *The decision to withdraw recognition*

Respondent acknowledges that on or about October 25, 1974, it refused to bargain with the Union and that it has withdrawn recognition from the Union. Respondent contends that at the time it refused to bargain it had sufficient objective basis for reasonably doubting the Union's continued majority.

The remarks of certain employees concerning their attitude toward the Union and various conversations between supervisors relating to the employees' attitudes are discussed above. Also, as indicated above, Konarske obtained information concerning the Union's trusteeship and the financial difficulties of the Union. In addition, Konarske knew that Nevada is a right-to-work state. He also knew that an election had never been held in the bar and culinary unit.

Konarske testified that in early September 1974 he reviewed the Company's turnover rate for employees in the bar and culinary unit and came to the conclusion that the rate was about 100 percent per year. He averred that that was an educated guess and that later he was of the opinion that the rate was even higher. At the time there were 165 or more employees in the unit. He testified that the percentage of turnover was less in the bar area, which was

17. Union Executive Officer Howard Lawrence credibly testified that the Union was solvent and able to pay its bills, that the International felt that additional organizing efforts had to be made, that additional sums of money had to be put in, that the money would come from the International, that the International wished to retain control of that money, and that the money was given on condition that there be a trusteeship.

more stable. Konarske was very vague with regard to the method he used to evaluate the turnover rate, but I credit his assertion that the turnover rate was very substantial.

Konarske credibly testified that to his knowledge there had been no grievances filed from 1958, when Respondent opened the premises, until after October 25, 1974, when Respondent refused to bargain, and that he never received any oral grievances. He also credibly testified that he was familiar with the collective-bargaining contracts, that he operated the business in conformity with those contracts, and that he never consciously violated them. He also averred that no violations were ever brought to his attention.

In mid-June 1974, Howard Lawrence, the Union's executive officer for the Lake Tahoe area, visited Respondent's premises and spoke to employees. He was told that seven employees were scheduled to be terminated because of a company rule that prohibited relatives from working together. The following day he held a meeting with 15 or 18 employees at the Carpenters Hall in Kings Beach and the proposed terminations were discussed. On June 18 or 19, 1974, he met with Executive Chef Dave Rightman at Respondent's premises and he protested the discharges. Rightman made a phone call and then agreed to rehire five of the seven employees.

During Lawrence's meeting with the employees there were complaints from employees that the 10-minute breaks and half-hour lunches were not being provided. Lawrence gave them a grievance form which was signed by employees. The grievance form was sent to the Nevada Labor Commission and the matter was later resolved.

The only written grievance filed by the Union related to the discharge of two employees, Alicia Faulkner and Brenda Randall. That grievance was filed on November 15, 1974. Lawrence discussed the matter with Konarske. Later Lawrence received a letter dated November 23, 1974, from Respondent's Hotel Manager Henderson, advising him that Clinton Knoll of the Association would contact him with regard to a board of adjustment hearing.[18]

It appears that the Union did not process any formal or informal grievances from the time Respondent opened the premises in 1958 until about June 18 or 19, when Lawrence contacted Executive Chef Dave Rightman concerning the seven discharges. However, there is no evidence that the Union abandoned the bargaining unit or failed to represent the unit employees during that period. Konarske knew of the outstanding collective-bargaining contracts and was unaware of any violations. There is no indication that the Union was aware of any company practices that violated the contract. Konarske credibly testified that through the years he met several business agents at Respondent's premises. Though he also testified he did not meet them very often, they were apparently there at times. In June 1974, Lawrence was at the premises speaking to employees and later in the month he was there protesting certain discharges to Respondent's Executive Chef Rightman. On September 21, 1974, Konarske saw Union Representative Bob Hart on the premises. At all times through November 30, 1974, the collective-bargaining contract was in effect.

Respondent withdrew from the Association on September 17, 1974. Konarske testified that Respondent became a single employer rather than remain in the multiemployer bargaining unit because he did not believe the Union continued to represent a majority of Respondent's employees and if Respondent continued in the Association, there might

18. The letter was dated November 23, 1974. It is noted that Respondent withdrew from the Association on or about September 17, 1974.

be some groups that would sustain the Union's majority. He further averred that it would not be to Respondent's advantage to stay in the Association. Shortly before or after September 17, 1974, Respondent retained an attorney and, according to the testimony of Konarske, the attorney "was to use any necessary method to get us disassociated with the Union."

d. *The Union's demand for negotiations, Respondent's refusal and the petition for an election*

The last contract expired by its terms on November 30, 1974. By letter dated July 22, 1974, Union International Trustee Al Bramlet notified Respondent of his desire to modify and change the contract and sought to arrange for collective-bargaining negotiations. On September 17, 1974, Respondent withdrew from the Association and on the same date Meta K. Fitzgerald, one of the owners of Respondent, wrote to the Union enclosing a copy of a letter it had sent to the Association and notifying the Union that Respondent terminated the collective-bargaining agreement as of the end of the term thereof. On September 27, 1974, Philip Bowe, the Union's attorney, wrote to Respondent acknowledging receipt of the September 17, 1974 letter (which notified the Union of Respondent's withdrawal from the Association) and requesting that Respondent immediately contact Bramlet to discuss a convenient time and place for negotiations. By a letter to the Union dated October 10, 1974, Respondent, through Meta Fitzgerald, stated that Respondent had never dealt with Bowe or Bramlet and asked what Bramlet's relation to the Union was. By letter dated October 15, 1974, Bowe explained to Respondent that Bramlet was the International trustee and that Tucker, who had been secretary-treasurer of the Union, was now

Bramlet's assistant. By letter dated October 18, 1974, Bowe demanded that Respondent begin negotiations. By letter dated October 25, 1974, Respondent's Attorney Nathan Berke reminded the Union that Respondent had timely withdrawn from the multiemployer unit and was handling its own collective bargaining. The letter went on to state:

> If the ambiguity in Mr. Bowe's letter is considered a request to bargain in a single employer unit, then at the instructions of our client, we inform you that our client has a genuine doubt that your Local represents an uncoerced majority of its employees in an appropriate unit. If following a validly conducted election in an appropriate unit under the aegis of the National Labor Relations Board, your Local should be selected as the bargaining agent, our client will at such time fulfill whatever legal obligation it may then have.
>
> Should you file a petition with the Board for an election, our client will cooperate looking toward an election in accordance with the Labor-Management Relations Act, as amended and the Board's applicable rules and regulations.

The Union filed a first amended unfair labor practice charge on November 13, 1974, in which it alleged that Respondent unlawfully refused to bargain with it.

Respondent admits that commencing on or about October 25, 1974, it has refused to bargain collectively with the Union and has withdrawn recognition from the Union.

On July 25, 1975, which was about 9 months after the refusal to bargain and about 8 months after the filing of the refusal to bargain charge, Respondent filed a petition for an election with the Board. The petition was blocked by the unfair labor practice charge and was thereafter dismissed.

2. Analysis and conclusions with regard to the refusal to bargain[19]

a. *The presumption of majority*

As the Board held in *Walter E. Heyman d/b/a Stanwood Thriftmart,* 216 NLRB No. 154:

> A contract, lawful on its face, raises a presumption that the contracting union was the majority representative at the time the contract was executed, during the life of the contract, and thereafter.[2]

2. *Shamrock Dairy, Inc.,* 119 NLRB 998, 1002 (1957), and 124 NLRB 494, 495-496 (1959), enfd. 280 F.2d 665 (C.A.D.C), cert. denied 364 U.S. 892 (1960).

In the instant case, the presumption of continued majority status is based on a contract in a multiemployer bargaining unit. The complaint alleges a refusal to bargain in a single-employer bargaining unit. A serious question is presented whether the presumption of continued majority which flowed from the existence of the multiemployer contract survived the withdrawal of Respondent from the multiemployer unit and can be applied to the newly created single-employer unit. There has never been any contract between Respondent and the Union in the single-employer unit and, therefore, any presumption of majority must flow from Respondent's inclusion in the multiemployer contract that expired on November 30, 1974.

In *Downtown Bakery Corp.,* 139 NLRB 1352, enf. den. in pert. part 330 F.2d 921 (C.A. 6, 1964), a successor employer

19. Much of the legal analysis set forth below is the same as that which is contained in my decisions in *Sahara-Tahoe Corporation, d/b/a Sahara-Tahoe Hotel,* JD-(SF)-9-76 (issued January 21, 1976), *Tahoe Nugget, Inc., d/b/a Jim Kelley's Tahoe Nugget,* JD-(SF)-19-76 (issued January 28, 1976), and *Barney's Club, Incorporated,* JD-(SF)-35-76 (issued February 20, 1976), cases that involved many of the same legal principles.

refused to bargain with a union where that union was the Board-certified representative of the employees in a multi-employer bargaining unit which included a predecessor employer. In that case the predecessor employer had signed a separate collective-bargaining agreement with the union. Relying on a presumption of continued majority, the Board found that the successor employer violated Section 8(a)(5) of the Act by refusing to bargain with the union in the single-employer unit. The Sixth Circuit Court of Appeals refused to enforce the Board's bargaining order, holding in part that there was not sufficient evidence in the record to support a finding of majority status of the union.

In *The Richard W. Kaase Company,* 141 NLRB 245, enf. den. in pert. part 346 F.2d 24 (C.A. 6, 1965), a similar factual pattern was presented, and the Board followed its *Downtown Bakery Corp.* precedent. In *The Richard W. Kaase Company* case, a union was certified as the collective-bargaining agent of the employees of employers in a multi-employer bargaining unit which included a predecessor employer. That employer executed a separate collective-bargaining agreement. Thereafter, a successor employer continued to recognize the predecessor's contract but later withdrew recognition. The Board found that the successor violated Section 8(a)(5) of the Act. The Sixth Circuit Court of Appeals once again refused to enforce the Board's order, holding: "the ambiguity inherent in the multiemployer election here relied on vitiates its efficacy to prove a majority as to any single employer."

The Board law established by the *Downtown Bakery* and *Richard W. Kaase Company* cases is not directly applicable to the instant situation. In each of those cases, the individual employer had signed separate collective-bargaining contracts with the union, and the presumption of continued

majority could flow from those contracts rather than from the multiemployer certification. In the instant case, the initial collective-bargaining contract was in a multiemployer bargaining unit and the succeeding contracts to which Respondent was a party were multiemployer bargaining contracts.[20] However, I believe that the presumption of continued majority flowing from the multiemployer contracts requires a derivative presumption of the Union's majority status which is applicable to each of the employer-members of the multiemployer bargaining unit separately. Unless a majority of an employer's employees desire representation by a union, that employer may not lawfully force representation on them by joining a multiemployer bargaining arrangement. *Mowhawk Business Machines Corporation*, 116 NLRB 248; *Dancker & Sellew, Inc.*, 140 NLRB 824, enf. 330 F.2d 46 (C.A. 2, 1964). Thus, Respondent would have violated the Act in 1960 when it became party to the multiemployer collective-bargaining agreement if a majority of its employees did not desire representation. Any unfair labor practice charge relating to such a violation would have had to have been filed within 6 months from that time. Respondent may not now either attack the initial bargaining relation or use it to establish a defense to a refusal to bargain complaint. As the Board held in *North Bros. Ford, Inc.*, 220 NLRB No. 154:[21]

> Section 10(b) of the Act confines the issuance of unfair labor practice complaints to events occurring during the 6 months immediately preceding the filing of a charge and has been interpreted by the Supreme Court to bar finding any unfair labor practice, even though committed within that period, which turns on whether or not events outside that period violated the Act. *Bryan Manufacturing Co.*[3] The Court, holding that maintenance and enforcement of a contract more than 6 months after recognition of a minority union did not violate the Act, relied in part on the legislative history indicating that Congress specifically intended Section 10(b) to apply to agreements with minority unions in order to stabilize bargaining relations. Noting that labor legislation traditionally entails compromise, the Court observed
>
> > that the interest in employee freedom of choice is one of those given large recognition by the Act as amended. But neither can one disregard the interest in "industrial peace which it is the overall purpose of the Act to secure."[4]
>
> The Board, in light of *Bryan*, has since held that Section 10(b) is applicable to a refusal-to-bargain defense that the bargaining relation was unlawfully established.[5]

20. It is also noted that, unlike the instant situation, both those cases involved conflicting representational claims by rival unions.

21. See also *Walter E. Heyman d/b/a Stanwood Thriftmart, supra.*

3. *Local Lodge No. 1424, IAM, AFL-CIO* [*Bryan Manufacturing Co.*] *v. N.L.R.B.*, 362 U.S. 411 (1960).

4. *Id.* at 428, citations omitted.

5. *Barrington Plaza and Tragniew, Inc.*, 185 NLRB 962 (1970), enforcement denied on other grounds *sub nom., Tragniew, Inc., and Consolidated Hotels of California v. N.L.R.B.*, 470 F.2d 669 (C.A. 9, 1972); *Roman Stone Construction Company, and Kindred Concrete Products, Inc.*, 153 NLRB 659, footnote 3 (1965).

Respondent may not, at this late date, attack either the initial recognition of the Union by Respondent or the initial contract. It cannot defend against the refusal-to-bargain

complaint on the ground that the original contract was entered into at a time when the Union did not represent a majority of the employees of Respondent. Nor can it defend on the ground that the Union did not represent a majority of the employees in the overall multiemployer bargaining unit. That contract must be considered valid on both those grounds. The presumption of majority status which continued over the years based on successive contracts applies both as to the employees of Respondent and to the employees in the multiemployer unit. I therefore find that the General Counsel has properly relied on that presumption to establish the Union's majority in the unit in question. It remains to be considered whether Respondent has successfully rebutted that presumption.

b. *The attempt to rebut the presumption*

(1) The background law

In *James W. Whitfield d/b/a Cutten Supermarket,* 220 NLRB No. 64, the Board summarized the existing law, holding:

> It is well settled that Section 8(a)(5) and Section 8(d) of the Act require an employer to recognize and bargain in good faith with the bargaining representative selected by a majority of its employees. That recognition establishes a presumption of majority status which, in circumstances such as this, may be rebutted.[6] The employer may lawfully refuse to bargain with the union if it rebuts the presumption by affirmatively establishing that the union has in fact lost its majority status, or shows that it has sufficient objective bases for reasonably doubting the union's continued majority status.[7] To establish sufficient objective bases, however, requires more than the mere assertion thereof based upon the employer's subjective frame of mind.[8] Furthermore, the employer must not have engaged in any conduct tending to encourage employee disaffection from the union.[9]

6. Cf. *N.L.R.B. v. Frick Company,* 423 F.2d 1327 (C.A. 3, 1970); *Keller Plastics Eastern, Inc.,* 157 NLRB 583 (1966).

7. *Celanese Corporation of America,* 95 NLRB 664, 672 (1951); *Peoples Gas System, Inc.,* 214 NLRB No. 141 (1974).

8. *Laystrom Manufacturing Co.,* 151 NLRB 1482 (1965), enforcement denied 359 F.2d 799 (C.A. 7, 1966); *Automated Business Systems, Inc., a Division of Litton Business Systems, Inc.,* 205 NLRB 532 (1973), enf. denied 497 F.2d 262 (C.A. 6, 1974).

9. *Peoples Gas System, Inc., supra.*

In *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Association of Pocatello, Idaho and its Employer-Members,* 213 NLRB No. 74, the Board held that these principles are equally applicable whether the union was certified by the Board or was recognized without Board certification. In that case, the Board held that the existence of a prior contract, lawful on its face, raised a presumption that the union was the majority representative at the time the contract was executed and also raised the presumption that the union's majority continued at least through the life of the contract. The Board held that "Following the expiration of the contract . . . the presumption continues and, though rebuttable, the burden of rebutting it rests on the party who would do so . . . ."

(2) The alleged actual loss of majority

For the reasons set forth above, the presumption of continued majority which flowed from the contract survived the change in the bargaining unit and applied to the single-employer unit. It follows that the change in the unit is not in itself proof that the Union no longer represented a majority of Respondent's employees.

In June 1974, the Union had about $11,000 in its treasury and that amount was decreasing. However, the Union's liabilities did not exceed its assets, and even if they did, the Union's financial condition would not indicate how many employees the Union actually represented. Even if Staff were correct in his estimate that there were about 30,000 employees in the Lake Tahoe and Reno areas who were employed in categories over which the Union had jurisdiction, that figure would not give any insight into how many employees the Union in fact did represent.

About that time the Union had approximately 900 or 1,000 members, of whom perhaps 20 percent were from the Lake Tahoe area. Between 700 and 800 were paid up in their dues. Those are industry-wide figures and there is no way to tell from them how many of Respondent's employees were union members. Even if Respondent had established that a majority of its employees were not members of the Union, such a showing would not be the equivalent of establishing a lack of desire of those employees for union representation. Employees may desire representation without wanting to join a union or pay dues. *Orion Corp.*, 210 NLRB 633, enf. 515 F.2d 81 (C.A. 7, 1975). As the Board stated in *Wald Transfer & Storage Co.*, 218 NLRB No. 73:

> It has been clearly established that a distinction exists between union membership and union support, foreclosing relying upon one as evidence of the other. Here, union membership being voluntary in this right-to-work State emphasizes that distinction. Many employees while approving of the Union may not choose to give it their financial support *or* participate as members.[3]

3. *See Terrell Machine Company*, 173 NLRB 1480 (1969), enfd. 427 F.2d 1088 (C.A. 4, 1970), cert. denied 398 U.S. 929; *N.L.R.B. v. Gulfmont Hotel Company*, 362 F.2d 588, 592 (C.A. 5, 1966).

The fact that employees in the industry at the Lake did not attend a union meeting after announcements were placed in newspapers may indicate some apathy on the part of employees who happened to see the announcements. It does not indicate that a majority of Respondent's employees no longer desired to be represented by the Union.

The Union sought funds from the International to organize employees in the industry and to build up its membership so that it would have strength in negotiating the next contract. The Union also accepted International trusteeship. Those facts, however, do not indicate whether or not the Union represented a majority of Respondent's employees. The Union wanted to obtain more members in the industry and it engaged in some internal revisions, but it would be sheer speculation to make an evaluation based on those facts as to the number of Respondent's employees the Union actually represented.

Some of the bartenders at the Overland Hotel in Reno told Staff, in substance, that they were dissatisfied with the Union. There is no evidence in the record that any of the employees of Respondent ever expressed dissatisfaction with the Union to Staff.

The above matters in themselves, and when considered in connection with the matters set forth below relating to Respondent's claimed reasonable doubt as to the Union's majority, fall short of establishing that the Union in fact did not represent a majority of Respondent's employees.

(3) The alleged reasonably based doubt of the Union's majority status

The Board has long held that questions relating to an employer's reasonably based doubt as to a Union's continued majority cannot be resolved by the application of

any mechanical formulas and can only be answered "in the light of the totality of all circumstances involved in a particular case." *Celanese Corporation of America,* 95 NLRB 664. In the instant case Respondent has raised a number of matters on which it claims to have based a reasonable doubt as to the Union's majority. These matters must be considered in the context of the major disruption in the bargaining unit which occurred when Respondent withdrew from the Association, and also in the context of the filing by Respondent of a petition for an election. Respondent withdrew from the Association more than a month before it refused to bargain with the Union in the single-employer unit. Respondent contends that at the time of the withdrawal from the Association it doubted the Union's majority in the single-employer unit and disassociated itself from the Association because it thought that there might be some groups in the multiemployer unit that would sustain the Union's majority. Respondent's General Manager Konarske believed that it would not be to Respondent's advantage to stay in the Association. About the time of the withdrawal from the Association, Respondent's attorney, according to Konarske, "was to use any necessary method to get us disassociated from the Union." Respondent did not see fit to file a petition for an election until some 9 months after it refused to bargain with the Union.

Konarske, the official who made the decision to refuse to bargain with the Union, knew that Nevada was a right-to-work state. However, no inference can be drawn from that concerning whether or not the Union represented a majority of Respondent's employees. Cf. *Wald Transfer & Storage Co.,* 218 NLRB No. 73. Konarske also knew that no election had ever been held among its employees. However, the presumption of majority can be based on either

certification or voluntary recognition, and where an employer voluntarily recognizes a union, it cannot use that fact as a basis for doubting the union's majority. Cf. *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Association of Pocatello, Idaho, and its Employer-Members, supra.*

Konarske read in the newspapers and heard on the radio that the Union was in trusteeship and that the Union had financial difficulties. He could also gather from his conversations with supervisors and employees and from his observation of employees' union pins that the Union was engaging in organizational activities during the summer of 1974. The fact that the Union was undergoing internal revisions does not indicate whether or not it continued to represent a majority of Respondent's employees. A union may have financial difficulties whether or not it represents a majority, and organizational activity only indicates that a union desires more members than it has.

Konarske knew that there was a very substantial turnover among the bar and culinary employees. At first, he estimated that turnover at about 100 percent a year and later he concluded that it was even higher. High turnover is one circumstance, among others, that must be considered in determining whether an employer has a reasonably based doubt as to a union's majority status. *People's Gas System, Inc.,* 214 NLRB No. 141; *Convair Division of General Dynamics,* 169 NLRB 131; *Kentucky News, Inc.,* 165 NLRB 777. However, high employee turnover in itself is insufficient to establish a reasonable doubt as to a union's majority, and the Board has repeatedly held that new employees will be presumed to support a union in the same ratio as those they may replace. *Strange and Lindsey, Inc.,* 219 NLRB No. 190; *King Radio Corporation,* 208 NLRB 578, enf. 510 F.2d 1154 (C.A. 10, 1975).

Konarske knew that some of the employees were dissatisfied with the Union. Employee Gau told Konarske that she had no interest in the Union and that she had no intention of supporting the Union. Employee Ronzo told Konsarke that he (Ronzo) had no respect for the Union. Employee Dungan told Konarske that she did not feel that the Union was necessary and that she did not want to pay dues to the Union. Employee Schu told Koranske that he (Schu) was not interested in the Union and was getting fed up with them. Employee Harbaugh told Konarske that he (Harbaugh) was satisfied with conditions and that there was no advantage to belonging to the Union. Employee Curreo told Konarske that they were satisfied with management's working conditions.

In all, there were six employees who expressed some dissatisfaction with the Union to Konarske. Four of those employees also told Konarske that other employees were dissatisfied. Gau told him that most of the girls were not interested in belonging to the Union. Ronzo told him that the Company should not be concerned about the Union because the Union got little support from the cooks and they were satisfied and pleased with working conditions as established by management. Dungan told him that he did not have to worry about the cocktail waitresses and barboys because, with one exception, none of them were concerned about the Union and that they didn't feel the Union was necessary for their welfare. Curreo told him that the Company did not have to worry about the cooks supporting the Union and that almost everybody was against the Union.

Respondent contends that it had reasonable basis for doubting the Union's continued majority. It cannot successfully support that contention through the testimony of Konarske that four employees told him that unnamed other

employees were displeased with the Union. Under the circumstances, Konarske could have had no way of evaluating whether those four employees were basing their opinion as as to the other unnamed employees on fact, conjecture or rumor.

Six named employees did express some displeasure with the Union to Konarske. Even if those expressions of displeasure can be equated with a desire on behalf of those employees not to be represented by the Union,[22] Respondent has fallen far short of establishing that a majority of the employees in the bargaining unit did not want the Union to represent them. Six out of the 165 or more employees in the bar and culinary unit expressed displeasure with the Union to Konarske. The number that had expressed displeasure was insubstantial with relation to the overall employee complement in the unit and Respondent could not base a reasonable doubt of majority on such a limited number of remarks. Cf. *Strange and Lindsey Beverages, Inc., supra; Cornell of California, Inc.*, 222 NLRB No. 38.

Konarske also spoke to supervisors concerning the status of the Union. Bar Manager Connor told Konarske that there was no problem among the cocktail waitresses or busboys, but that he was uncertain whether or not the bartenders would support the Union. Hotel and Food Manager Henderson told Konarske that they didn't have a thing to worry about and that the girls were not supporting the Union. Henderson reported to Konarske a remark made by Supervisor Rightman to the effect that there would be no problem with the Union with relation to the girls and

22. See *Strange and Lindsey Beverages, Inc., supra*, in which the Board held that statements by employees that they did not want to pay money to the union or that they did not want to get involved did not indicate that those employees no longer wanted to be represented by the union.

busboys and that there would be no support for the Union from them. In addition, Henderson told Konarske that in his (Henderson's) opinion the Union lacked support in the culinary workers unit and that there was a lack of interest in the Union. However, the subjective evaluations of supervisors cannot be used as a basis for reasonably doubting a union's majority. As the Board held in *Terrell Machine Company,* 173 NLRB 1480, enf. 427 F.2d 1088 (C.A. 4, 1970), cert. denied 398 U.S. 929 (1970):[23]

> To be of any significance, the evidence of dissatisfaction with a validly recognized incumbent Union must come from the employees themselves, not from the employer on their behalf.

The Union did not process any formal or informal grievances from the time Respondent opened in 1958 until about June 18 or 19, 1974, when Union Representative Lawrence contacted Supervisor Rightman concerning certain discharges. However, there is no showing that there were any contract violations calling for grievances or that the Union was inactive in representing the employees in the unit at any time. Lack of activity by a union is one factor to be considered in evaluating whether a company has a reasonable doubt of the union's majority. *Taft Broadcasting,* 201 NLRB 801. However, other than the lack of grievances, Respondent has not established such a lack of activity. Union agents were on the premises throughout the years and successive contracts were in effect until Respondent refused to bargain. There is no showing that the Union failed in its responsibility to represent the employees.

23. In finding a violation in the *Terrell* case, the Board noted: "That the Respondent could have filed a petition for an election, or asked that the Union do so, in order to resolve its alleged doubt, but it took no such steps."

In *United Supermarkets, Inc.,* 214 NLRB No. 142, the Board found that an employer did not have a reasonable doubt based on objective facts as to the union's continued majority status. The Board held:

> A showing of such doubt requires more than an employer's mere assertion of it, and more than proof of an employer's subjective frame of mind. The assertion must be supported by objective considerations, that is, some substantial and reasonable grounds for believing the union has lost its majority status. [Footnotes omitted.]

After considering all the factors set forth above, I conclude that Respondent did not have substantial and reasonable grounds for believing that the Union has lost its majority status. Respondent's assertion in that regard was based on subjective rather than objective considerations. In sum, I find that the presumption of continued majority has not been rebutted either by a showing that the Union, in fact, lost its majority status or by a showing that Respondent had a sufficient objective basis for reasonably doubting the Union's continued majority.[24] In addition, as found below, Respondent violated Section 8(a)(1) of the Act by announcing and granting across-the-board wage increases for its cooks, waitresses and busboys in September 1974 in order to induce employees to abandon their support for the Union. Thus, at the time of the refusal to bargain, Respondent was engaging in conduct tending to encourage employee disaffection from the Union.[25] Cf. *James W. Whit-*

24. Cf. *N.L.R.B. v. Thompson, Inc.,* ..... F.2d ..... (C.A. 5, 1976), 91 LRRM 2137.

25. The other violations of the Act found below occurred after October 25, 1975, when Respondent claimed to doubt the Union's majority status and refused to bargain.

field d/b/a Cutten Supermarket, 220 NLRB No. 64. I find that Respondent refused to bargain with and withdrew recognition from the Union in violation of Section 8(a)(5) and (1) of the Act as alleged in the complaint.

C. *The Other Violations Alleged in the Complaint*

1. The alleged independent Section 8(a)(1) violations

The parties stipulated, and I find, that on an unknown date in September 1974, Respondent announced and granted across-the-board wage increases for its cooks, waitresses and busboys. The contract that was in effect at that time provided in part:[26] "The Employer is granted the right to increase any privileges, benefits or wages provided for by this Agreement." The General Counsel does not contend that the increase constituted a violation of the contract or a refusal to bargain with the Union. He does contend, however, that the increase violated Section 8(a)(1) of the Act in that it was announced and granted to induce employees to abandon their support for the Union. Respondent did not give prior notification to or consult with the Union prior to the increase. Respondent's General Manager Konarske testified that the increase was granted on about September 17, 1974, because a competitor, the North Shore Club, had opened near Respondent, that club had attracted some of Respondent's kitchen employees and waitresses, and Respondent had to do something to counteract the competition. Konarske also testified that article I, section 6 of the contract permitted Respondent to do so.

26. The full text of article I, section 6 of the contract is set forth above.

The parties stipulated and I find that on an unknown date in December 1974, Respondent announced, and later on or about January 1, 1975 put into effect, certain employee service recognition pay, holiday pay and birthday pay programs. The announcement of the recognition pay program indicated that a recognition program had previously been in effect which paid service pay each Christmas and that the new program changed the time of payment to the employees' anniversary date as well as extending the program to provide for employees who worked for 30 or more years. Another announcement related to holiday and birthday pay. That provided that a new benefit was to be effective January 1, 1975, that granted time and a half pay to employees who worked on seven named holidays. It also provided that in addition to the holiday pay all employees would receive as a birthday bonus either double time pay for their birthday if their birthday fell on a regular workday and they had to work, or straight-time pay if their birthday fell on their normal day off and they did not work. All these benefits were granted without prior notification to or consultation with the Union. Respondent offered no evidence with regard to the reason for granting those benefits.

The parties stipulated and I find that on an unknown date in January 1975 Respondent announced and granted to employees in the bargaining unit time and a half pay for a 6th consecutive day worked, whereas prior to that the employees in the unit had received straight time for having worked an additional 6th day. The increase was announced and granted without prior notification to or consultation with the Union. Respondent offered no evidence concerning the reason for the increase.

The parties stipulated and I find that on an unknown date in February 1975 Respondent announced, and on February 15, 1975 Respondent instituted, a dental insurance plan covering its employees, including those employees in the bargaining unit. The plan was announced and instituted without prior notification to or consultation with the Union. Respondent offered no evidence with regard to the reason for the institution of the plan.

Whether or not the Union waived its right to bargain about increases in employee benefits during the term of the contract, Respondent was still subject to the provisions of Section 8(a)(1) of the Act. It could not lawfully grant benefits in order to induce employees to abandon their support for the Union.

Respondent granted the across-the-board wage increases for its cooks, waitresses and busboys on about September 17, 1974. It was on September 17, 1974, that Respondent withdrew from the Association. Respondent believed that it would not be to its advantage to stay in the Association and Respondent's General Manager Konarske acknowledged that Respondent's attorney "was to use any necessary method to get us disassociated from the Union." Konarske's own choice of language clearly establishes that he was strongly motivated to avoid continued unionization. That animus was manifested at about the same time that Respondent granted the across-the-board wage increases for its cooks, waitresses and busboys. Konarske's bare assertion that Respondent had to meet competition from another club was unconvincing. There is no evidence in the record concerning the competitor's wage structure, nor is there enough detail in Konarske's testimony with regard to Respondent's competitive position to give that testimony meaningful weight. Respondent introduced no testimony to

shed light on its past practices or established procedures with regard to wage increases.

In December 1974, Respondent changed and improved its service recognition pay program and provided holiday pay and birthday pay. In January 1975, Respondent improved the pay for 6th consecutive day worked. In February 1975, Respondent instituted a dental insurance plan. Respondent introduced no evidence with regard to the reason for those changes. Nor did Respondent introduce any testimony to shed light on past practices or established procedures with regard to improvements in benefits.

Under all these circumstances, I find that Respondent announced and granted the wage increases and the employment benefits described above in order to induce employees to abandon their support for the Union, thereby violating Section 8(a)(1) of the Act.

2. The alleged unilateral change violation of Section 8(a)(5) of the Act

The complaint also alleges that Respondent refused to bargain in violation of Section 8(a)(5) of the Act by unilaterally instituting the dental insurance plan described above.

As is set forth above, article I, section 6 of the contract that expired on November 30, 1974, provided that the employer was granted the right to increase any privileges, benefits or wages provided for by the agreement. In addition, article II, section 4 A of that contract provided:

> The Employer agrees that all employees covered by this Agreement shall be entitled to and shall receive the same insurance benefits provided for the other employees of the Employer working at the establishments and/or locations referred to herein.

The General Counsel argues that article I, section 6 of the contract has no application to Respondent's institution of a dental insurance plan because that benefit was newly created and was not an increase in "benefits . . . provided for by this agreement." I believe that the General Counsel's reading of the contract is unduly restrictive. The contract provides for a number of benefits. Anything additional granted to employees is an increase in those benefits. For example, if two benefits are provided in a contract, a third benefit, even if it is entirely new, is an increase in the benefits already provided for by the contract. As the heading of article I, section 6 states: *"Employer May Increase Benefits, Privileges and Wages Without Prejudice."* I do not believe that the contract can be fairly read to mean that the employer could freely raise wages in any amount but was narrowly restricted in the type of benefits it could add. In addition, the institution of the dental insurance plan was permitted by another section of the contract. Article II, section 4 A, which is set forth above, provides that all employees covered by the agreement shall be entitled to and receive the same insurance benefits provided for the other employees of the employer working at the establishment. It was stipulated that the dental insurance plan covered Respondent's employees, including those employees in the unit. Thus, it appears that nonunit employees also received the dental insurance benefits. The contract, therefore, not only allowed Respondent to grant the same insurance benefits to the unit employees but required that it be granted. However, the Union's contractual waiver of its right to bargain about the dental insurance plan was not in effect in February 1975 when the plan was announced and instituted. The contract expired on November 30, 1974, and the contractual waivers contained in article I, section 6 and article II, section 4 A of the contract also expired at that

time. As found above Respondent unlawfully refused to bargain with the Union on October 25, 1974. Respondent's obligation to bargain in good faith with the Union is a continuing one and was in effect after November 30, 1974, when the contract expired. Once the contract expired, Respondent had the obligation to maintain existing wages and benefits while bargaining in good faith with the Union concerning any changes. There was no contract outstanding and therefore Respondent could not rely on any contractual right to make unilateral changes. Even if the waiver provisions could be considered part of the wage and benefit package that had to remain unchanged and subject to bargaining after the expiration of the contract, Respondent could not use those provisions to justify a unilateral change while unlawfully refusing to recognize and bargain with the Union. In addition, that change in benefits was one of many changes that were unlawfully made to induce employees to abandon their support for the Union. In the circumstances described above, Respondent unilaterally and without prior notification to or consultation with the Union instituted the dental insurance plan.[27] By doing so, Respondent violated Section 8(a)(5) and (1) of the Act.[28]

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent, as set forth in Section III, above, occurring in connection with the operations of Re-

27. The complaint does not allege nor does the General Counsel urge a finding that the other wage and benefit changes were in violation of Section 8(a)(5) of the Act. Therefore, no findings are made in that regard.

28. Cf. *Guerdon Industries, Inc., Armour Mobile Homes Division*, 218 NLRB No. 69; *N.L.R.B. v. Benne Katz, d/b/a Williamsburg Steel Products Co.*, 369 U.S. 736 (1962); *Mosher Steel Company*, 220 NLRB No. 47.

spondent described in Section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent is engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Nothing contained in the recommended Order will require or permit Respondent to withdraw or discontinue any wage increase or other employee benefit already granted.

Having found that Respondent violated Section 8(a)(5) and (1) of the Act by unlawfully withdrawing recognition from the Union and by refusing to bargain with the Union as the exclusive representative of its employees in the aforesaid appropriate unit, I recommend that Respondent be ordered to recognize and, upon request, bargain in good faith with the Union as the exclusive representative of its employees in that unit.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and it will effectuate the policies of the Act for the Board to assert jurisdiction.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By announcing and granting wage increases, by announcing and granting improved pay for service recogni-

tion, holidays, birthdays and a 6th consecutive day worked, and by instituting a dental insurance plan, all to induce employees to abandon their support for the Union, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. All employees employed by the Respondent in its bar and culinary operations at its Crystal Bay, Nevada operations, excluding all other employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. At all times material herein, the Union has been the exclusive bargaining representative of the employees in the aforesaid appropriate unit within the meaning of Section 9(a) of the Act.

6. By withdrawing recognition from the Union and by refusing to bargain with the Union, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

7. By unilaterally instituting a dental insurance plan without notification to or consultation with the Union, Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(5) of the Act.

8. By the foregoing conduct, Respondent has interfered with, restrained and coerced employees in the exercise of rights guaranteed by Section 7 of the Act, thereby engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

9. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[29]

ORDER

Respondent, Nevada Lodge, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Announcing or granting any wage increase or employee benefit to induce employees to abandon their support for the Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO. Nothing contained in this Order will require or permit Respondent to withdraw or discontinue any wage increase or other employee benefit already granted.

(b) Refusing to recognize and bargain in good faith with Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, as the exclusive representative of its employees in the following bargaining unit:

> All employees employed by it in its bar and culinary operations at its Crystal Bay, Nevada operations, excluding all other employees, guards and supervisors as defined in the Act.

(c) Unilaterally instituting any employee benefit without bargaining in good faith with said Union.

29. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

(d) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Recognize and, upon request, bargain in good faith with Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, as the exclusive representative of its employees in the unit described above.

(b) Post at its Crystal Bay, Nevada facility copies of the attached notice marked "Appendix."[30] Copies of said notice on forms provided by the Regional Director for Region 20, after being duly signed by its authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced or covered by any other material.

(c) Notify the Regional Director for Region 20, in writing, within twenty (20) days from the date of this Order what steps it has taken to comply herewith.

Dated: March 8, 1976

RICHARD D. TAPLITZ
Richard D. Taplitz
Administrative Law Judge

30. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Appendix C

FORM NLRB—4727
(9-69)

NOTICE TO
EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE
UNITED STATES GOVERNMENT

We hereby notify you that:

WE WILL NOT announce or grant any wage increase or employee benefit to induce employees to abandon their support for the Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO. Nothing contained herein will require or permit us to withdraw or discontinue any wage increase or employee benefit already granted.

WE WILL NOT refuse to recognize and bargain in good faith with Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, as the exclusive representative of our employees in the following bargaining unit:

All employees employed by us in our bar and culinary operations at our Crystal Bay, Nevada operations, excluding all other employees, guards and supervisors as defined in the Act.

WE WILL NOT unilaterally institute any employee benefit without bargaining in good faith with said Union.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of their rights guaranteed by Section 7 of the Act.

WE WILL recognize and, upon request, bargain in good faith with said Union as the exclusive representative of our employees in that unit.

NEVADA LODGE
(Employer)

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND
MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 13018 Federal Building, 450 Golden Gate Avenue, Box 36047, San Francisco, California 94102, Telephone Number: (415) 556-0335.

No. 78-1379

In the Supreme Court of the United States

OCTOBER TERM, 1978

TAHOE NUGGET, INC., dba JIM KELLEY'S TAHOE NUGGET, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.
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INDEX

CITATIONS

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-28) is reported at 584 F. 2d 293. The decisions and orders of the Board (Suppl. App. 1-89) are reported at 227 N.L.R.B. 357 and 227 N.L.R.B. 368.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1978. A timely petition for rehearing was denied on October 20, 1978 (Pet. App. 29-30). On January 9, 1979, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including March 10, 1979. The petition was filed on March 9, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly concluded that petitioners violated Section 8(a)(5) of the National Labor Relations Act by withdrawing recognition from and refusing to bargain with the union without having a reasonably based good-faith doubt of the union's majority support among their employees.

STATUTE INVOLVED

1. Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), provides in part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 * * *;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees * * *.

2. Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b), provides in part:

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board * * * shall have power to issue and cause to be served upon such person a complaint stating the charges * * * and containing a notice of hearing * * *: *Provided*, that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge * * *.

STATEMENT

1. Petitioner Tahoe Nugget operates a bar, restaurant, and casino in Crystal Bay, Nevada (Suppl. App. 13). Petitioner Nevada Lodge operates a restaurant, hotel, and

casino in the same area (Suppl. App. 48).[1] Prior to 1974, petitioners were members of the Reno Employers Council (the "Association"), an association of employers engaged in casino, restaurant, and related businesses. The Association represents its members in collective bargaining with various unions, including the Hotel-Motel-Restaurant Employees and Bartenders Union, Local 86, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO (the "Union") (Suppl. App. 13-14, 48-49). When Tahoe Nugget and Nevada Lodge joined the Association (in 1962 and 1960 respectively) they became parties to the existing Union-Association contract. In doing so, they recognized the Union as the representative of their bar and culinary employees (Suppl. App. 14, 50).

In September 1974, petitioners announced their timely withdrawal from membership in the Association (Suppl. App. 14, 50). Thereafter, petitioners refused the Union's request to enter into bargaining on an individual basis. Petitioners claimed that they had a genuine doubt that the Union represented an uncoerced majority of their employees (Suppl. App. 2, 59).

2. Unfair labor practice charges were then filed by the Union. The Board concluded that the petitioners had violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from and refusing to bargain with the Union on an individual basis (Suppl. App. 5, 43, 78).[2]

---

[1]The court of appeals consolidated the two unfair labor practice proceedings involving the petitioners (*Tahoe Nugget, Inc.*, Suppl. App. 1-42; *Nevada Lodge*, Suppl. App. 43-89) for argument and decision.

[2]The Board also found that Nevada Lodge violated Section 8(a)(5) and (1) of the Act by unilaterally changing employee working conditions following their withdrawal from the Association and also violated Section 8(a)(1) by announcing and granting pay increases in order to induce employees to abandon support of the Union (Suppl. App. 5, 81, 83).

The Board noted that an employer may not lawfully join a multi-employer bargaining unit unless a majority of his employees desire to be represented by the union that has been recognized for the multi-employer unit. Accordingly, there is a presumption that, at the time an employer joins a multi-employer unit and adopts its contract, the union has the majority support of that employer's employees (Suppl. App. 2-3). This presumption continues, not only while the employer remains in the multi-employer unit, but also after he withdraws from the unit and reverts to single-employer status (Suppl. App. 2).[3] In light of this presumption, the Board concluded that it was necessary for the employers in this case to "show either that the [U]nion in fact no longer enjoys majority status or that [their] refusal to bargain was predicated on a reasonably grounded doubt as to the [U]nion's continued majority status" (Suppl. App. 4). The Board then reviewed the findings of the Administrative Law Judge and concluded that petitioners had failed to make either showing (Suppl. App. 5).[4] The Board ordered

[3]The Board noted (Suppl. App. 3) that petitioners may not now claim that the Union lacked "majority status among [their] employees in the single-employer unit[s] [at the time] when recognition was originally extended" because, under the "decision in [*Local Lodge No. 1424, I.A.M.* v. *NLRB*, 362 U.S. 411 (1960)], * * * [an employer] may not defend against a refusal-to-bargain allegation on the ground that original recognition, occurring more than 6 months before charges had been filed in the [unfair labor practice] proceeding raising the issue, was unlawful." Under the decision in *Local Lodge No. 1424, I.A.M.* v. *NLRB*, 362 U.S. 411 (1960), any "such defense is barred by Section 10(b) of the Act" (Suppl. App. 3).

[4]Neither employer introduced evidence such as an employee vote to prove that the Union in fact no longer enjoyed majority support. Both sought to show that they had a reasonably based good-faith doubt as to the Union's continued majority status.

In asserting its doubt as to the Union's majority support, Tahoe Nugget relied upon a "rumor concerning low Union membership and dues payment" in the Reno area, rumors and articles concerning Union organizing efforts and alleged financial difficulties, Union

petitioners to recognize and bargain in good faith with the Union (Suppl. App. 5, 39, 43-44, 87).[5]

3. The court of appeals upheld the Board's decision and enforced its orders. The court agreed with the Board that the presumption that the Union represents the majority of the employees remains applicable to the

inactivity in representing employees, high turnover of unit employees, and reports of employee expressions of dissatisfaction with the Union. The Administrative Law Judge, "considering all of [these] factors," concluded that Tahoe Nugget "did not have substantial and reasonable grounds for believing the Union had lost its majority status" (Suppl. App. 36). He pointed out that the membership rumor was not "keyed to union membership * * * among [Tahoe Nugget's] employees. In Addition, * * * a lack of employee membership cannot be equated to a lack of desire of employees for union representation" (Suppl. App. 32-33). The Administrative Law Judge also noted that "a union may have financial difficulties whether or not it represents a majority, and organizational activity only indicates that a union desires more members than it has" (Suppl. App. 33). Concerning the contention that the Union had filed no grievances during 1974, the Administrative Law Judge noted that "there is no showing that the filing of grievances was warranted, and there is no showing that the Union failed to actively represent the employees in the past" (*ibid.*). He also explained that the employer's reliance on turnover to support a doubt of majority status is ineffective because, under Board precedent, new employees are presumed to support the union in the same ratio as the old (Suppl. App. 34). Finally, the Administrative Law Judge noted that Tahoe Nugget's representations concerning employee dissatisfaction with the Union involved only three named employees (one of whom was not a member of the unit) out of the 35 to 52 unit employees, as well as "bits and pieces of overheard conversations by an undisclosed number of other employees * * *" (Suppl. App. 35).

Nevada Lodge also relied on alleged Union financial difficulty and organizational activity, turnover, lack of grievance activity, and employee expressions of dissatisfaction with the Union (Suppl. App. 71-77). As to the latter, the Administrative Law Judge noted: "Six out of the 165 or more employees in the * * * unit expressed displeasure with the Union to [the general manager]. * * *[Nevada Lodge] could not base a reasonable doubt of majority on such a limited number of remarks" (Suppl. App. 75).

[5]Petitioner Nevada Lodge was also ordered to desist from granting unilateral wage increases (Suppl. App. 86).

individual employer units upon their withdrawal from the multi-employer unit.[6] The court explained (Pet. App. 17-18); footnote omitted):

> When [petitioners] joined the Association and recognized the Union, they implicitly declared their employees favored the Union. Thus, majority status can be directly inferred from the employer's own conduct; the presumption is not derived from the larger unit's majority, but originates with the employer's implicit declaration of a majority in the single employer unit. Moreover, the original factual inference is convincing: employers normally will not knowingly violated the law and union fraud is rare. Continued membership in the larger unit does nothing to negate this principle even though the larger unit becomes the appropriate one for bargaining. The original presumption subsists: withdrawal from the unit simply entails a reversion to the original unit, a unit previously determined from the employer's own conduct to favor union representation.

Turning to the Companies' contention that they possessed a good-faith doubt of the Union's continuing majority support, the court found the evidence of employee dissatisfaction to be "unreliable and the inference from it tenuous" (Pet. App. 23). The court observed that the showing of Union inactivity was "de minimis" (Pet. App. 25-26). The court also noted that "[t]here was no evidence here of employee-led challenges to the Union's representation or of abdication by the Union" (Pet. App. 27). Finally, assessing the

[6]The court also agreed (Pet. App. 6-7) with the Board that the petitioners' contention that the Union had not enjoyed majority support among their employees at the time they joined the Association was timed-barred by Section 10(b) of the Act. See note 3, *supra*.

"[c]umulative [e]ffect of the [e]vidence," the court concluded (Pet. App. 28):

> None of the evidence is wholly referable to a decline in Union support within the relevant units. Most of the evidence indicates the Union had equivocal support in the Lake Tahoe area. Some of the evidence is subjective; the inferences of loss of Union support are ambiguous. Before unilaterally disrupting the bargaining relationship, an employer must obtain more reliable evidence of lost support.

ARGUMENT

Petitioners do not dispute the settled proposition that majority support is presumed to continue following certification or voluntary recognition and that, absent unusual circumstances, this presumption is irrebutable for a year and thereafter is rebutted only if the employer shows "that the union was [in fact] in the minority or that the employer had a good faith reasonable doubt of majority support at the time of the refusal [to bargain]" (Pet. App. 4-5). See, *e.g.*, *NLRB* v. *Vegas Vic, Inc.*, 546 F. 2d 828, 829 (9th Cir. 1976), cert. denied, 434 U.S. 818 (1977); *NLRB* v. *Dayton Motels, Inc.*, 474 F. 2d 328, 332 (6th Cir. 1973). Instead, petitioners contend that this presumption should not survive an employer's withdrawal from a multi-employer bargaining unit, and that, in any event, they were entitled to rebut the presumption by showing that the Union did not enjoy majority support at the time voluntary recognition was accorded. Petitioners also claim that the Board and the court of appeals erred by refusing to consider the cumulative weight of the individual factors asserted as establishing a good-faith doubt of continued majority representation. There is no merit to these contentions.

1. Petitioners claim (Pet. 6, 16-19) that, in conflict with *NLRB* v. *Richard W. Kaase Co.*, 346 F. 2d 24 (6th

Cir. 1965), the presumption of continuing majority status in the individual units has been improperly derived from the Union's status as representative for the multi-employer unit. However, neither the Board nor the court of appeals relied on the reasoning that petitioners challenge.

Instead, both the Board (Suppl. App. 2-3) and the court (Pet. App. 15-19) emphasized that the presumption that the Union represented a majority of each individual unit flowed, not from the fact that the Union had majority support in the multi-employer unit, but from the fact that petitioners had voluntarily recognized the Union as representative of their employees at the time they joined the multi-employer group. The court of appeals expressly distinguished this case from the situation in *NLRB* v. *Richard W. Kaase Co., supra.* In *Kaase Co.*, as the court below pointed out (Pet. App. 17 n.36): "[T]he union's position as exclusive bargaining representative of the Kaase employees originated with an election in the multi-employer unit. No evidence showed the Kaase employees themselves ever favored the union; thus, the fact of majority status in the single-employer unit had never been established, as it had been here by the employer's voluntary recognition."[7] There is thus no conflict among the circuits warranting further review in this case.

2.a. The Board and the court of appeals correctly concluded that petitioners' attempt to rebut the presumption of continuing majority status by showing that the Union did not enjoy majority status when it was first recognized by petitioners (in 1960 and 1962) was barred by the six-month limitations period in Section 10(b) of the Act, 29 U.S.C. 160(b). See notes 3 & 6, *supra.* In *Local Lodge No. 1424, supra,* 362 U.S. at 416, the Court noted that "[i]t is doubtless true that §10 (b) does not

[7]In a multi-employer election, the union must receive a majority of the votes of the participating unit employees, but does not have to secure a majority from the employees of any individual employer.

prevent all use of evidence relating to events transpiring more than six months before the filing and service of an unfair labor practice charge." The Court held that (*id.* at 416-417; footnote omitted):

> [I]n applying rules of evidence as to the admissibility of past events, due regard for the purposes of §10 (b) requires that two different kinds of situations be distinguished. The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose §10 (b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice.

Applying these principles in *Local Lodge No. 1424,* the Court concluded that the Board could not base a finding that a contract is unlawful upon the fact that, at the time the contract was executed, the Union lacked majority support when the contract had been signed more than six months before the Section 10(b) charge was filed. The unlawful time-barred event could not be used "to cloak with illegality that which was otherwise lawful." 362 U.S. at 417.

Similarly, to permit petitioners in this case to challenge the presumption of continued lawful bargaining relations

with the Union by delving into events that transpired more than a decade previously, in order to establish that the Union lacked majority status when it was first recognized, would serve "to cloak with illegality that which was otherwise lawful" in violation of the purposes of Section 10(b). Thus, as the court of appeals observed (Pet. App. 7), evidence that an unfair labor practice occurred more than six months before the Section 10(b) charge is filed cannot, by itself, be invoked as a defense to a refusal to bargain charge. See *Lane-Coos-Curry-Douglas Counties Building and Construction Trades Council* v. *NLRB*, 415 F. 2d 656, 659 n.7 (9th Cir. 1969).

b. Contrary to petitioners' contention (Pet. 8-9), the decision of the court of appeals on this issue is not in conflict with *NLRB* v. *Dayton Motels, Inc.*, 474 F. 2d 328 (6th Cir. 1973). In *Dayton Motels*, the employer had sought to prove, in defense to a refusal to bargain charge, that the authorizations obtained to secure union recognition more than six months before the charge was filed were obtained by a supervisory employee who had collaborated with the union and that this fact had been fraudulently concealed from the employer. The Sixth Circuit held that Section 10(b) did not preclude this proof (*id.* at 333):

> [T]hese events were admissible as background evidence reflecting on the mental attitude or good-faith doubt of the Company officials that the Union ever represented a majority of its employees. In no way does this constitute an attack on the validity of the expiring agreement or on the presumption [of majority status] created thereby, which attack was barred by Section 10(b) of the Act.

The Sixth Circuit observed that it was permissible "for the Company to show that it discovered, more than one year after the collective bargaining agreement was signed, the

complicity of its supervisor and the concealment by the Union of its misconduct." *Id.* at 334.[8]

In the present case, however, petitioners sought to introduce evidence of the Union's lack of majority support at the time of the Union's initial recognition for the very purpose of attacking the validity of the presumption of continuing majority status (Suppl. App. 2-3, 26-28, 66-69). Moreover, there is no evidence in this case of any fraudulent concealment of misconduct that would lift the six-month restriction of Section 10(b). See *International Ladies' Garment Workers Union* v. *NLRB*, 463 F. 2d 907, 922 (D.C. Cir. 1972).

3. Finally, petitioners are mistaken in their claim (Pet. 7-8, 12-16) that the Board refused to consider the totality of the evidence in determining whether petitioners possessed a reasonably based good-faith doubt of the Union's continuing majority status. Both the Board (Suppl. App. 32, 71-72) and the court (Pet. App. 28) expressly considered the cumulative effect of the claims and justifications advanced by petitioners on this issue. The Administrative Law Judge, whose findings on the evidence were adopted by the Board, noted that the question whether an employer has a "reasonably based doubt as to a union's continued majority cannot be resolved by the application of any mechanical formulas and can only be answered 'in the light of the totality of all circumstances involved in a particular case.' *Celanese Corporation of America*, 95 NLRB 664" (Suppl. App. 32).[9]

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[8]After the remand to the Board in *Dayton Motels*, the Board found that "although the union's original majority in 1967 was tainted by the prounion activities of a female supervisor, that conduct 'in no way entered into respondent's decision in June 1970 to withdraw recognition from the union and refuse to bargain with it.' " 525 F. 2d 476, 477 (6th Cir. 1975). The court of appeals then enforced the Board's order. 415 F. 2d at 659 n.7.

[9]Petitioners agree (Pet. 12) that the *Celanese* case establishes the correct rule.

Petitioners' claim is thus, in substance, only a disagreement with the Board as to the factual conclusions to be drawn from the evidence.[10] A claim that the Board's findings are not supported by substantial evidence does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). Moreover, there is ample evidence to support the Board's finding in this case. See note 4, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1979

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[10]Contrary to petitioners' claim (Pet. 19-20), the court did not fail to address its assertion that the Union in fact did not represent a majority. The court stated (Pet. App. 3, n.6): "Evidence to show the Union was actually in the minority was also offered; but the evidence was clearly insufficient and therefore will not be discussed." See also Suppl. App. 30-31, 69-71.

DOJ-1979-04

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-1379

TAHOE NUGGET, INC., dba JIM KELLEY'S TAHOE NUGGET, and NEVADA LODGE,

Petitioners,

VS.

NATIONAL LABOR RELATIONS BOARD, and HOTEL-MOTEL-RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 86, HOTEL & RESTAURANT EMPLOYEES & BARTENDERS INTERNATIONAL UNION, AFL-CIO,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT UNION'S BRIEF IN OPPOSITION

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-28) is reported at 584 F.2d 293. The decisions and orders of the Board (Supp. App. 1-89) are reported at 227 N.L.R.B. 357 and 227 N.L.R.B. 368.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1978, after consolidation of the two cases for

argument and decision. A timely petition for rehearing was denied on October 20, 1978 (Pet. App. 29-30). On January 9, 1979, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including March 10, 1979. The instant petition was filed on March 9, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Board abused its discretion in holding that the presumption of majority status, derived from petitioners' voluntary recognition of the Union as the representative of their own employees, could not be defeated by petitioners' subsequent withdrawal from a multiemployer bargaining unit?

2. Whether the Board's finding that petitioners had not established a reasonably grounded doubt of the Union's majority status was supported by substantial evidence?

STATUTE INVOLVED

1. Section 8(a) of the National Labor Relations Act, 29 U.S.C. § 158(a), provides in relevant part:

> "It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 * * *;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees * * *."

2. Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), provides in relevant part:

> "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board * * * shall have power to issue and cause to be served upon such person a complaint stating the charges * * * and containing a notice of hearing * * *: *Provided*, that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge * * *."

STATEMENT OF THE CASE

The Brief For The National Labor Relations Board In Opposition herein succinctly and accurately states the case.

ARGUMENT

I. There Is No Conflict Among the Circuits Created By the Court of Appeal's Holding That the Presumption of Majority Status Applies In This Case

Consistent with established judicial authority, the Board held in this case that petitioners' voluntary recognition of the Union as the bargaining representative of their respective bar and culinary employees gave rise to a continuing presumption of the Union's majority support among those employees. (Supp. App. 2-3)[1] As this Court has stated, such recognition without a Union majority would violate the Act. *International Ladies' Garment Workers' Union v. N.L.R.B.*, 366 U.S. 731, 737-739 (1961). Once established, the presumption of majority support continues throughout the term of a collective bargaining agreement and beyond. *Celanese Corp. of America*, 95 N.L.R.B. 664,

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[1] *See N.L.R.B. v. Frick Co.*, 423 F.2d 1327 (3d Cir. 1970); *N.L.R.B. v. Cayuga Crushed Stone, Inc.*, 474 F.2d 1380, 1383 (2d Cir. 1973); *N.L.R.B. v. Denham*, 469 F.2d 239 (9th Cir. 1972), *vacated on other grounds*, 411 U.S. 945 (1973).

672 (1951), *cited with approval in N.L.R.B. v. Burns Security Service,* 406 U.S. 272 n.2 (1972).

On this predicate,[2] the court of appeal upheld the Board's determination that the presumption subsisted following petitioners' withdrawal from the multiemployer unit:

> "When respondents joined the Association and recognized the Union, they implicitly declared their employees favored the Union. Thus, majority status can be directly inferred from the employer's own conduct; the presumption is not derived from the larger unit's majority, but originates with the employer's implicit declaration of a majority in the single employer unit. Moreover, the original factual inference is convincing: employers normally will not knowingly violate the law and union fraud is rare. Continued membership in the larger unit does nothing to negate this principle even though the larger unit becomes the appropriate one for bargaining. The original presumption subsists: withdrawal from the unit simply entails a reversion to the original unit, a unit previously determined from the employer's own conduct to favor union representation." (footnote omitted)
>
> [Pet. App. 17-18]

The case of *N.L.R.B. v. Richard W. Kaase Co.*, 346 F.2d 24 (6th Cir. 1965) is not at all in conflict with the holding of the Board. As petitioners acknowledge (Pet. 6), the *Kaase* court invalidated a presumption of majority status derived from a multiemployer election following the employer's withdrawal; unlike petitioners, the employer there had never voluntarily recognized that union as representative of its own employees.

[2]Plainly, then, petitioners' assertion that the Board adopted some "derivative" presumption flowing from the multiemployer bargaining relationship (Pet. 16) is without foundation. There was no concatenation of presumptions applied here, only the single presumption arising from petitioners' voluntary act of recognition.

The Board and the court of appeal properly held that petitioners could not avoid application of the presumption by now claiming that the initial recognition more than a decade earlier had been unlawful. Because petitioners' recognition of a minority union would have been an unfair labor practice occurring beyond the six-month limitation period in Section 10(b) of the Act, both the Board and the court of appeal concluded petitioners could not revive a legally defunct unfair labor practice in order to defend against a present refusal to bargain. *Local Lodge No. 1424, I.A.M. v. N.L.R.B.*, 362 U.S. 411, 416 (1960); *N.L.R.B. v. District 30, U.M.W.*, 422 F.2d 115, 122 (6th Cir. 1969), *cert. denied.* 398 U.S. 959 (1970).

Apart from disallowing petitioners' attack on the validity of the Union's presumption of majority support, the court of appeal also correctly held that the circumstances of the initial recognition could not be used to bolster petitioners' claim of subjective good faith in refusing to bargain in 1974. Even if the companies' alleged unlawful recognition were admitted to show their good faith in suddenly deciding to accord their employees a free choice of bargaining representative in 1974, the court of appeal concluded that merely subjective belief was not sufficient ground to disrupt the stability of the bargaining relationship. Consistent with other courts of appeal, the court held petitioners' claimed reasonable doubt could only be sustained by objective facts showing a majority of their em-

ployees no longer desired Union representation. *N.L.R.B. v. Vegas Vic, Inc.*, 546 F.2d 828, 829 (9th Cir. 1976), *cert. denied*, 434 U.S. 818 (1978); *Terrell Machine Co. v. N.L.R.B.*, 427 F.2d 1088, 1090 (4th Cir. 1970), *cert. denied*, 398 U.S. 929 (1970); *Lodges 1746 & 743, I.A.M. v. N.L.R.B.*, 416 F.2d 809 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1058 (1970). As the court below stated:

> "We hold the employer is free to act on the objective grounds before him, regardless of his underlying motivation. If union support is lacking, the employer's action actually furthers the cause of employee democracy by overcoming the inertia which helps maintain the status quo. Since the employer's action is not in derogation of employee rights, his subjective motivation is important only evidentially. In sum, when challenging the union majority, good faith is demonstrated if the employer is aware of the facts manifesting lack of union support and employer misconduct did not contribute to the loss of support." (footnotes omitted)[3]
>
> [Pet. App. 11-12]

Contrary to petitioners' assertion (Pet. 8), neither of the court of appeal's grounds for excluding evidence of the claimed unlawful initial recognition conflicts with the Sixth Circuit's decision in *N.L.R.B. v. Dayton Motels, Inc.*, 474 F.2d 328 (6th Cir. 1973). In *Dayton Motels*, as in this case, the court held that circumstances establishing an unfair labor practice at the time of initial recognition of the union could not ". . . constitute an attack on the validity of the

[3]In this case, the Board also found that petitioner Nevada Lodge violated Section 8(a)(1) of the Act by announcing and granting pay increases to induce employees to abandon support of the Union. (Supp. App. 44, 81).

expiring agreement or on the presumption created thereby, which attack was barred by Section 10(b) of the Act." *Id.*, 474 F.2d at 333. Consistent with the Ninth Circuit and other cases in that Circuit, it held that the employer must show both reasonable grounds for doubting the union's majority status, and good faith in asserting that doubt. *Id.*, 474 F.2d at 330; *Bally Case & Cooler, Inc. v. N.L.R.B.*, 416 F.2d 902 (6th Cir. 1969); *N.L.R.B. v. Washington Manor Inc.*, 519 F.2d 750 (6th Cir. 1975). Nevertheless, the court held, evidence of fraudulent procurement of authorization cards at the union's initial recognition was material to show the employer's subjective good faith in refusing to bargain. *Id.*, 474 F.2d at 334.

Evidence of an employer's subjective good faith could be relevant where it had already established objective grounds for doubting a union's majority status. *E.g., Bally Case & Cooler, Inc. v. N.L.R.B., supra.* But the court below held that petitioners had not established reasonable grounds for doubting the Union's majority status; petitioners' protestations of good faith were therefore immaterial, and the circumstances of initial recognition irrelevant:

> "If, but only if, the employer can show the union's majority is truly in doubt, the situation confronted is at the opposite end of the spectrum from the situation where the employer's conduct is inherently destructive of employee rights. It follows that not only is proof of anti-union motivation then unnecessary, but it is immaterial to the charge. We emphasize, however, that the employer must have ample evidence in support of his doubt before we can condone this assumption of the cause of employee democracy."
>
> [Pet. App. 11 n.24]

Consistent with the Sixth Circuit, therefore, the court below held the evidence of subjective good faith inadmissible. (Pet. App. 13)

The sole conflict between the decision of the court below and *Dayton Motels* is, as petitioners assert (Pet. 10), a difference of whether an employer's proof of reasonable good faith doubt serves as a complete defense, or whether it merely shifts the burden of going forward to the General Counsel. As the court below stated, "[s]ince the General Counsel usually relies on the presumption alone, as he did here, the distinction is primarily academic." (Pet. App. 6). The distinction is solely academic in this case, as petitioners did not sustain their burden of rebutting the Union's presumptive majority status.

II. The Court Of Appeal And The Board Properly Assessed The Cumulative Impact Of Factors Claimed To Support Petitioners' Reasonable Doubt; Accordingly, There Is No Conflict In Decisions Meriting Review

Petitioners' remaining contention is the repeated assertion that the court of appeal and the Board refused to consider the cumulative effect of the facts claimed to support the companies' reasonable doubt. (Pet. 5, 6, 11, 13, 14). That assertion simply has no basis in the record.

After analyzing each of the factors alleged by petitioner Tahoe Nugget to support its reasonable doubt, the Administrative Law Judge stated:

> "After considering all of the factors set forth above, I conclude that Respondent did not have substantial and reasonable grounds for believing the Union had lost its majority status. Respondent's assertion in that regard was based on subjective rather than objective considerations." (footnote omitted)
>
> [Supp. App. 36]

The Administrative Law Judge analyzed the same cumulative impact with regard to petitioner Nevada Lodge. (Supp. App. 77)

Similarly, the court below analyzed the cumulative effect of each of the factors asserted by petitioners, in accordance with explicit guidelines which the opinion set forth:

> "When the Board looks to the cumulative force of the evidence, the factors are reconsidered and weighed against the force of the presumption. If unexplained, the cumulative inferential weight of these equivocal factors might suffice to establish that the refusal to bargain was reasonable."[46]

[46]"But we have found no cases in which the reasonable doubt defense was sustained based solely on equivocal evidence. Common to each case was the presence of at least one factor clearly referable to a lack of majority support."
[Pet. App. 21]

The court of appeal concluded that "[n]one of the evidence is wholly referable to a decline in Union support within the relevant units", and therefore affirmed the Board's determination. (Pet. App. 28).

Petitioners are reduced to claiming the Board erred in the evidentiary weight accorded each of petitioners' asserted objective considerations, since it had previously held similar factors—once established—sufficient to justify a refusal to bargain (Pet. 14). In essence, this is a confession that petitioners have engaged in brinksmanship in

attempting to thwart collective bargaining among their employees. As another court of appeal stated in an analogous context, ". . . one who engages in 'brinksmanship' may easily overstep and tumble into the brink" *Wausau Steel Corp. v. N.L.R.B.*, 377 F.2d 369 (7th Cir. 1967). Petitioners' disagreement with the Board's findings with respect to the weight of the evidence does not merit review by this Court. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 490-491 (1951). Also, because such an evidentiary determination turns on the totality of all the circumstances, review of the Board's findings cannot have a substantial impact on other litigants.

CONCLUSION

For all the above reasons, as well as for the reasons stated in the Brief For The National Labor Relations Board in Opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 7, 1979

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM 1978

NO. 78-1379

TAHOE NUGGET, INC. d/b/a
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REPLY BRIEF FOR PETITIONERS

The Board's Sole Opposition Injects An Issue Not Involved

The Board in cavalier fashion deals with this case as though it were a mine-run Universal Camera situation. [1] The Board merely addresses its opposition on the basis of whether there was substantial evidence to support its order. This approach, and it is basically the only response by the Board, while understandable is unwarranted. Having carefully read the Board's brief in opposition, we have looked in vain for the Board's answers to the serious constitutional and federal law questions raised in our petition. [2] For the Board to come to grips with the serious issues raised would only lend support to the reasons

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1/ Universal Camera Corp. v. National Labor Rel. Bd., 340 U.S. 474

2/ The Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO filed a Brief in Opposition which substantially parrots the Court of Appeals and Board rationale but does not squarely meet these issues.

why this Court should grant review. We are not requesting and have not requested this Court to review an issue of substantial evidence since that is not involved here.

The Board does not respond to the admitted conflict by the Court below with the Sixth Circuit in the application of the good faith doubt defense to the Board developed presumption of continuing majority. (Pet. 10) Nor does the Board respond to the conflict which exists between the Ninth Circuit and other Circuits. (Pet. 5-10) It is completely silent on the internal conflict which exists in the Ninth Circuit on the issue. (Pet. 10-12) It does not respond to the important federal law issue of the triple presumption which the Board indulged in as the basis for its conclusion. (Pet. 16-19) It ignores the Board's failure to

follow its precedents in Celanese Corporation of America, 95 NLRB 664, and other cases cited and discussed in the Petition. (Pet. 12-16) It makes no reference to the due process issue, which both the Board and the Court below bypassed contrary to the holdings of this Court. (Pet. 19-20)

The Board apparently prefers the conflict which exists since it permits the Board to at least win in the Ninth Circuit on issues which it has lost in other Circuits.

New Cases Not Available At Time Petition Filed

Apart from the cases now pending in the Ninth and District of Columbia Circuits involving the issues raised here (Pet. 10) several other cases have recently been decided by the Ninth Circuit and other Courts involving the presumption and objective considerations.

These were reported since the petition herein was filed. National Car Rental System v. N.L.R.B., __F.2d__, 100 LRRM 2824 (C.A. 8, 1979); N.L.R.B. v. Morse Shoes, Inc., 591 F.2d 542, 545-546 (C.A. 9, 1979); N.L.R.B. v. Randle-Eastern Ambulance Service, Inc., 584 F.2d 720 (C.A. 5, 1978); and Hirsch v. Pick-Mt. Laurel Corp., 436 F.Supp. 1342 (D.N.J., 1977). 3/

In National Car Rental System, supra, the Board's order was denied enforcement, the Court holding that a "Board created presumption does not rise to the level of substantial evidence." Yet the Board is here urging precisely that in basing its position on Universal Camera. Indeed, the

3/ Randle-Eastern was decided after Petitioners' cases were decided below and Hirsch was decided in 1977, but both were not brought to our attention until reported in recent issues of LRRM (99 LRRM 3377 and 96 LRRM 2254, respectively).

Board is basing its case upon a layer of presumptions each dependent upon each other.

In Randle-Eastern, supra, the Court denied enforcement of the Board's order to bargain, holding that the "Board's determination otherwise rested on presumptions we deem inapplicable, on the rejection of inferences we consider permissible, and on an assumption that the Union's loss of support, if any, was due in part to Company conduct . . . that we have determined to be entirely lawful."

In Hirsch v. Pick-Mt. Laurel Corp., supra, the Board's petition for an injunction pendente lite under Section 10(j) of the Act [29 U.S.C. §160(j)] to enjoin an employer from refusing to bargain with a union, was denied on the basis of the employer's good faith doubt as to the union's continuing majority status. The

Court also held in construing this Court's opinion in Bryan Manufacturing Co. [4] that evidence of circumstances surrounding a time-barred unfair labor practice is admissible to explain the actions of the charged party within the limitations period (436 F.Supp. at 1354-1357). Thus, that Court, as well as the Sixth Circuit [5], is in conflict on that issue with the Court below. (Pet. 8-10, 20)

As the Court in Hirsch, supra, also pointed out, the employer "does not have the burden of proving an actual numerical majority opposing the union." (1357) The Court also took into account, contrary to the Board there and contrary to the Board and Court below, the fact that the union negotiated and executed the collective bargaining agreement "without the choice

4/ 362 U.S. 411.

5/ N.L.R.B. v. Dayton Motels, Inc., 474 F.2d 328.

or designation by any member of the bargaining unit." (1357) "This", said the Court, "is a factor not present in the cases cited by petitioner [the Board]." (1357-1358) Like in Hirsch, that factor is present in the instant case. (Pet. 4, 6, 14)

Since the issues are constantly recurring ones in the administration of the Act and since the conflicts as pointed out leave all parties in labor-management relations in a state of confusion and their rights under the Act dependent upon the Circuit which happens to decide the case, this Court must settle the issues by lifting the cases from the Court below.

Respectfully submitted,

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